

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GUY ST. CLAIR COMBS; MARION) CV-05-741 REJ-KSC
WILCOX COMBS; THE SCOTT)
MICHAEL ST. CLAIR COMBS) Volume 21
IRREVOCABLE TRUST; THE GUY)
ST. CLAIR COMBS III)
IRREVOCABLE TRUST; CATHERINE)
ANNE MOORE-AIRTH; STEVEN)
AUERBACH; CHARLES SLOGGETT;)
CARLA JORDAN; KRISTEN J.)
LA DOW; ROBERT B. JORDAN;)
MICHAEL P. JORDAN; JONATHAN)
WATERS FISHER; ANTHONY H.)
FISHER; GALEN M. FISHER;)
TIMOTHY WILCOX FISHER;)
RICHARD SLOGGETT, JR.;)
GERALD W. FISHER;)
THE CATHERINE ANNE MOORE-)
AIRTH REVOCABLE TRUST; THOMAS)
JOHNSTON; ANNE SLOGGETT)
HAMILTON; ARTHUR W.)
SLOGGETT; BARBARA PERRY)
FISHER; SCOTT G. FISHER;)
SUSAN CHAMBERLAIN; ERIK)
PETERSON; PATRICK FISHER;)
and MICHAEL FISHER,)

Plaintiffs,)

vs.)

May 22, 2008

STEPHEN M. CASE; ALPS)
INVESTMENT, LLC; ALPS)
ACQUISITION SUB, INC.; THE)
STEPHEN M. CASE REVOCABLE)
TRUST and KA PO'E HANA, LLC,)

Defendants.)

HONOLULU, HAWAII

TRANSCRIPT OF COURT TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBERT E. JONES

UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES

FOR THE PLAINTIFFS: Matthew H. Simmons
Seann Malloy
Alex Shubin
Simmons & Associates, Chartered
4833 Rugby Avenue, Suite 100
Bethesda, Maryland 20814

Damon M. Senaha
Attorney at Law
95-214 Hoakua Place
Mililani, Hawaii 96789

FOR THE DEFENDANTS: Paul Alston
David A. Nakashima
Stephen M. Tannenbaum
Jason Kim
Alston Hunt Floyd & Ing
1001 Bishop Street
American Savings Bank Tower, 1800
Honolulu, Hawaii 96813

COURT REPORTER: Dennis W. Apodaca, RMR, RPR, FCRR
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8182

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1 (May 22, 2008)

2 **P R O C E E D I N G S**

3 (Open court:)

4 THE COURT: Good morning, everybody. This
5 beautiful Oregon weather makes us homesick.

6 (The witness was duly sworn.)

7 THE WITNESS: Michael Connell. M-I-C-H-A-E-L,
8 C-O-N-N-E-L-L.

9 MR. ALSTON: Your Honor, before we begin with
10 the witness, we have a couple of housekeeping matters.

11 THE COURT: Yes.

12 MR. ALSTON: You will recall, when Ms. Gloria
13 Chang was testifying, there was some controversy about the
14 date of her memorandum. We have agreed to submit an
15 additional exhibit consisting of materials provided by
16 First Hawaiian Bank, after her testimony, that bear on the
17 date of her memorandum, which was disputed. Included is a
18 printout of the properties of the document from the Excel
19 program that shows it was created in December of 2000. We
20 have offered that by stipulation with the redactions as
21 Exhibit 2372. I'll make the redactions with the Court at
22 the break.

23 In addition, Your Honor, we talked about last
24 week, the Web site of the Malama Maha`ulepu activist
25 group, which is also coming in by stipulation, and also

1 the one from the Maui Explorer Web site is coming in by
2 stipulation. We will mark those at the next break.

3 Mr. Simmmons also --

4 MR. SIMMONS: I have a couple of things, Your
5 Honor. We have checked, and they agree to stipulate that
6 the "E" documents are from Faegre Benson. There was some
7 question about that.

8 I agree to the First Hawaiian Bank documents
9 coming in. I will argue a very different construction
10 what they mean as to the timing, but we agree they are
11 real and authenticate and so forth, and they are what they
12 purport to be, pursuant to the e-mail that will be
13 attached to them.

14 We also got a copy of Dennis Nakahara's redacted
15 report.

16 We had a written offer of proof concerning
17 Tom Johnston's testimony attached to which the Court will
18 find a Ninth Circuit case, which we think is instructive
19 as to the admissibility and relevance of what I would have
20 done with testimony in this context. We offer those two
21 things.

22 THE COURT: Thank you.

23 MR. SIMMONS: To the extent he needs to be made
24 available for cross, I think I can get Mr. Johnston today,
25 if the Court would like to hear from him. The case has

1 been highlighted in everyone's copy.

2 THE COURT: Well, I think you told us what he is
3 going to say.

4 MR. SIMMONS: This is a little more detailed,
5 but yes.

6 THE COURT: Okay. Anything further?

7 MR. ALSTON: No, Your Honor.

8 MR. SIMMONS: Oh, we have a joint -- we have a
9 joint stipulation on our exhibits. We will probably have
10 to deal with the rest today, and I think it needs to be
11 signed, I guess. We have two more exhibits that we are
12 going to offer. I conferred with my colleague; I will do
13 that later.

14 THE COURT: Thank you.

15 MR. NAKASHIMA: For the record, we ECF filed our
16 exhibit list, which included all the exhibits entered by
17 stipulation as well.

18 THE COURT: Thank you.

19 MR. NAKASHIMA: May I proceed, Your Honor?

20 THE COURT: Please do.

21 DIRECT EXAMINATION

22 BY MR. NAKASHIMA:

23 Q Good morning, Mr. Connell.

24 A Good morning.

25 Q Can you briefly tell us where you were born and

1 raised, your education and your employment generally
2 through, let's say, the year 2000.

3 A I was born in Southern California, in Pasadena,
4 California. I was raised, for the most part, at least
5 from the age 7 on in that area. I went to high school,
6 college and law school all in Massachusetts. In high
7 school, I went to Phillips Academy in Andover,
8 Massachusetts. I graduated in 1957. I then went to
9 Harvard College, took a degree, a bachelor's degree, but
10 it was in applied science, which was mathematics,
11 chemistry, astronomy and physics and graduated there in
12 1961.

13 I then went to Harvard Law School and graduated
14 in 1964. After leaving law school, I went to work for the
15 firm of Paul Hastings Janofsky & Walker in Los Angeles and
16 worked first as an associate, specializing in corporate
17 matters, principally mergers, acquisitions, mostly
18 involving private companies, although there were two
19 significant clients who actually did public work,
20 acquiring public companies, acquiring private companies.

21 Then as M & A type work slowed down at the end
22 of the '60s and early '70s, I became more and more
23 involved in a real estate type practice as well.

24 In 1978, I left Paul Hastings and went to the
25 Securities & Exchange Commission in Washington, D.C. I

1 spent approximately six months in the Office of the
2 General Counsel where I worked on all kinds of issues,
3 mostly involving appellate litigation or advisory
4 memoranda to the Commission itself.

5 At the end of that stint, I became the associate
6 director of the Division of Corporation Finance in charge
7 of legal affairs. Now, that's a long-winded -- the
8 Government only comes up with names like that. The
9 Division of Corporation Finance oversees the filings by
10 registered companies and securities offerings that are
11 made on a public basis and proxy materials, tender offers
12 and other activities.

13 My particular function with the commission in
14 that division was to oversee the rule-making function.
15 That was the most important of the things. The Office of
16 the General Counsel of that division, which passes out
17 advice and handles inquiries to the general public. The
18 Office of Tender Offers -- and we were involved in a
19 reorganization for a short time. I handled liaison with
20 the Division of Enforcement and some foreign filing
21 oversight work as well, but those functions were
22 transferred away as we reorganized.

23 In the rule-making side of this, I was
24 responsible for heading up a team that adopted what has
25 become known as the Integrated Disclosure Program. This

1 revised the periodic filings made by public companies, new
2 10Ks, 10Qs. 10Ks are annual reports; 10Qs are quarterly
3 reports. And Form 8 reports, 8Ks are reports for material
4 events, otherwise not required by the timing of the rules.

5 At the same time we also put in draft new
6 registration forms, S1, S2 and S3. As part of this
7 project, in order to coordinate the disclosure request of
8 all filings, we wrote regulation SK. Regulation SK
9 contains all the common rules that are used in all these
10 filings. If you are describing your executive officers,
11 the requirements are the same for a 10K or a 10Q, if it
12 happens to apply to that, or a registration statement, or
13 a proxy statement. They all incorporate this same central
14 body of rules, which was sort of the key to the integrated
15 disclosure process.

16 I left the Commission in 1980 and at that time
17 the company filing rules were adopted. The actual
18 registration forms had not been adopted at that time, and
19 it took almost two years to adopt them after I left,
20 although they were adopted almost without change of any
21 kind. The reason was that there was a change of
22 administrations, and the new Commission wanted to go back
23 and look over the process from beginning to end.

24 When I left the Commission, I went back to the
25 law firm of Paul Hastings Janofsky & Walker. And from

1 then on in my practice, I continued to do mergers and
2 acquisition activities and was a securities specialist as
3 well, based on my career with the commission, in part.

4 I left Paul Hastings Janofsky & Walker in, I
5 believe, 1989 approximately and went to the firm of
6 Morrison & Foerster. I also was in the Los Angeles
7 office. And I was in that office through -- well, through
8 2003, although in the year 2000, before this transaction,
9 I moved from a full-time partner in the firm, and I had at
10 one time been the managing partner of that office to a
11 part-time role and worked mostly out of my own office that
12 was located away from the Morrison Foerster office.

13 THE COURT: When you were managing partner, how
14 many partners and associates did you have?

15 THE WITNESS: In the Los Angeles office there
16 were 135, I believe, partners and associates;
17 approximately evenly split, about 60 partners, as I
18 recall, and the rest were associates. The firm, as a
19 whole, had about 650 partners and associates, and the
20 firm's home base is in San Francisco.

21 THE COURT: Thank you.

22 BY MR. NAKASHIMA:

23 Q How are you currently employed?

24 A I am employed on a part-time basis by Quateman LLP.
25 Quateman is a firm of ten lawyers of whom I think only

1 about four or five are actually full-time lawyers. Let me
2 amend that. They are all full-time lawyers other than
3 myself, but they aren't necessarily full-time with the
4 firm. They do quite a bit of municipal bond work. For
5 example, one of their -- one of the people associated with
6 the firm does tax work for that practice, but he also does
7 it for other firms as well.

8 Q Now, can you explain to us the retention of you and
9 your law firm in connection with the Grove Farm matter.

10 A Yes. Apparently an inquiry -- I didn't see the
11 inquiry directly -- was sent from the Case Bigelow firm to
12 our partner in the San Francisco office. He in turn
13 contacted, I believe it was Henry Fields, who was the then
14 head of the business practice in Los Angeles. Henry
15 recruited Michael Cohen and myself to work on the project,
16 based on what he thought our relevant experience was going
17 to be.

18 Q What was Mr. Cohen's experience as contrasted to or
19 similar to yours?

20 A He had less experience in what I would call the
21 public securities area, although he had engaged
22 extensively in private M & A transactions and general
23 corporate work along that line. I had done much of what
24 he had done and also had the securities experience.

25 Q Do you recall when you first got involved in the

1 Grove Farm matter?

2 A I think it was right away, on the 16th, if I
3 remember. I can't -- it could have been earlier, but I
4 believe it was on the 16th.

5 Q Of what month?

6 A Of November, I'm sorry, of 2000.

7 Q Now, what was your understanding as to what function
8 you and your law firm would serve in the Grove Farm
9 matter?

10 A We were to be independent advisors to the board of
11 directors to advise them as to the fairness of the
12 process, to the extent we're able; the fairness of the
13 price, to the extent it came out of the process; and in
14 particular to look at whether or not all bidders were
15 being -- and other interested parties -- were being
16 treated equally.

17 There had been some complaints that perhaps
18 ALPS, because it had a relationship through Mr. Case
19 Senior, was somehow being favored, and they wanted us to
20 look at that, and to assure the board that, at least as
21 far as we could determine, we didn't detect that
22 happening.

23 Q So with those three principal areas, what did you do?

24 A Well, we first reviewed documents that were available
25 to us, and we were sent the proxy statement, several of

1 the acquisition agreements. I would be hard pressed to
2 tell you exactly which versions of which, but we certainly
3 saw the ALPS final agreement, and we saw several drafts of
4 what ultimately became the Wattson Breevast -- although
5 those had just gone out -- as I recall, went out on about
6 the same time we came on.

7 We saw -- the principal concern at the time was
8 a Del Mar proposal, which the company had some enthusiasm
9 for, but they thought that this looked like it could
10 become a superior offer, and that's a technical term under
11 the agreement. And they were interested in pursuing that
12 to see if that could be the case. So we saw the Del Mar
13 materials, certainly the ones that came in on
14 November 10th. I am not sure we saw the earlier ones. I
15 don't recall actually. I think I might have, but I don't
16 recall. And we saw some correspondence that had gone on
17 at that time as well.

18 Q I believe you testified: Did you review the proxy
19 statement?

20 A Yes. I reviewed it carefully. Reviewed it for a
21 couple of things: First of all, it was a very valuable
22 source of background information. It showed the bidding
23 history, which was of importance to us in our assignment,
24 and it also gave a flavor of just how thorough these
25 people were going to be. I'm very familiar with proxy

1 statements, and I actually recall doing a comparison with
2 the public rules as to whether I thought this would come
3 close to complying or comply with those rules, even though
4 this was a private company and not subject to those rules.
5 And I thought that turned out to be a very favorable
6 comparison. I thought they had done a thorough job.

7 Q So after review and comparison, what was your opinion
8 as to the adequacy -- well, strike that. Had that proxy
9 statement already been issued?

10 A Yes, it had been. It was sent out somewhere around
11 the first week of November; I think the 3rd or 4th.

12 Q After your review and comparison, what was your
13 judgment and opinion?

14 A At this stage I think I withheld any judgment. I
15 wanted to know more than just read the document. On its
16 face I felt it was adequate and fair, but I wanted to test
17 some of these things and see whether or not -- what other
18 people had to say about it was consistent with what it
19 said.

20 Q So what did you do in that connection?

21 A In that connection I had conversations with -- and
22 almost all my conversations and the bulk of my
23 conversations and information came from Mr. Klebahn,
24 Mr. Cribley and Mr. Tanaka. I had the opportunity to talk
25 to all of the other directors, except Mr. Combs, who was

1 only present by telephone. I spoke, I believe, to the
2 chief financial officer very briefly, but again, didn't
3 have a long opportunity.

4 None of these were sit-down interview type
5 things; the time didn't permit that. But at each
6 opportunity I tried to get each person's flavor of what
7 had gone on and tried to find out whether something they
8 were saying was inconsistent with my understanding from
9 the proxy or from the prior interviews.

10 Q At some point did you come to an opinion as to the
11 adequacy of the proxy statement?

12 A Yes. By the time I reached the November 30 date, I
13 was of the opinion it was adequate, full and fair.

14 Q Did you have any input or involvement in what has
15 been called the supplemental proxy statement?

16 A Yes, I did.

17 Q There is a black binder in front of you.

18 A There was, but it seems to no longer be in front of
19 me.

20 MR. NAKASHIMA: I think my partner, Mr. Alston,
21 took it from you.

22 BY MR. NAKASHIMA:

23 Q Could you turn to tab 1369.

24 A Yes. This is the letter -- supplemental letter to
25 the shareholders that you were referring to.

1 Q And did you review this letter in draft form?

2 A Yes, I did.

3 Q Did you and your partner make comments?

4 A We did. We made -- yes, we did.

5 Q To your knowledge, who was the drafter or originator
6 of this document?

7 A It is a good question. It was jointly drafted. The
8 originator of the first draft, I believe, was either
9 Mr. Cribley or Mr. Tanaka, or maybe the two of them
10 together. But the final product, Mr. Cohen in particular
11 was very much involved, and I participated in that as
12 well.

13 Q Do you recall any input or changes by any ALPS
14 representative or the Carlsmith law firm into the
15 supplemental proxy statement?

16 A No. I know that under the agreement they had the
17 right to see things before they went out, but I was not
18 aware specifically -- maybe I was -- but I certainly don't
19 remember being aware of any specific comments.

20 Q What was the purpose of the supplemental proxy?

21 A Let's start off what it wasn't. It wasn't because
22 there was some big material change of events. What it
23 was, was that information concerning the Del Mar letter
24 had leaked to the shareholders. In fact, the leak was
25 found. It was a Del Mar person who had delivered a copy

1 of the letter to at least one or maybe possibly more of
2 the shareholders.

3 So what we had was a situation where the
4 information was uneven. Some shareholders knew about
5 Del Mar and others did not. There was also indications
6 that were reported to us by Mr. Klebahn in particular and
7 Mr. Cribley that some shareholders thought it was a viable
8 transaction and why weren't the board of directors
9 pursuing a \$175 offer, which is a pretty reasonable thing
10 to be concerned about. In fact, it was never a real
11 offer. And secondly, by the time of the 20th, actually on
12 the 17th, Del Mar had withdrawn.

13 So we now had shareholders who were out there
14 with information which, at best, was misleading, and it
15 was the consensus view that we should cure that; that we
16 should make sure that everybody had the same information
17 and that that information should be accurately portrayed
18 rather than inaccurately portrayed.

19 Q And were you personally in favor of issuing a
20 supplemental proxy?

21 A I was. In fact, both Michael and I were encouraging
22 this, but I think everybody agreed that something had to
23 go out. We were not in agreement as to necessarily what
24 it should say, but we were in agreement that something
25 should go out.

1 Q Well -- when you say there was differences or
2 disagreement, who was that between?

3 A That was really -- it was Mr. Klebahn, in particular,
4 and I think Mr. Cribley agreed with him, were reluctant to
5 include in the supplement the mention of the \$175 or any
6 mention of Wattson Breevast.

7 We were of the view that, look, the letter that
8 was already out there had that number in it. If you
9 didn't put the number in with reasonable explanation, it
10 continued to be confusing.

11 So both Michael Cohen and I -- we actually had
12 an internal exchange on this, but between the two of us,
13 we were very much of the view that this ought to happen.

14 Now, with respect to Wattson Breevast, it was
15 kind of a difficult situation, because in these situations
16 you would almost never disclose a letter of intent
17 exchange like the one that was going on with
18 Wattson Breevast. The reason for that is that there is no
19 deal and everything you put out would be subject to change
20 and change without notice. So you would end up -- once
21 you start coming up with more and more information
22 everyday, in theory at least, and the cases have long
23 recognized that you don't have to go out with that so long
24 as there is an indication that somebody is leaking the
25 information, like the Del Mar situation, and there was no

1 indication that people were -- had encountered the
2 Wattson Breevast information and were somehow relying on
3 it.

4 But we actually ended up on the other side of
5 that and encouraged that they disclose the existence of
6 this, because we thought by telling people that Del Mar
7 had gone away, and then being silent, that there was a
8 strong implication there were no other indications of
9 interest.

10 So we did encourage something to go in. There
11 was a first draft that I think was undertaken by
12 Mr. Cribley on the subject. We had comments that we
13 thought that he had perhaps gone too far with this. All
14 we really wanted to do was show that there was an
15 indication of interest. We didn't want to tell people --
16 we didn't want to encourage or discourage people about the
17 proposal.

18 Q Let's go back to Del Mar. Was the \$175 per share
19 price included in the supplemental proxy?

20 A Yes, it was.

21 Q That was by agreement?

22 A It was a consensus view in the end. Actually, the
23 way that worked was that we took our positions to the
24 board. Mr. Klebahn and Mr. Cribley made a presentation
25 and said: We don't think we need to put this in, and we

1 think it might be misleading to suggest \$175, when it
2 wasn't. We said it ought to go in, for the reasons I just
3 explained, and that we thought we could qualify it in ways
4 to explain the weaknesses of the number. Ultimately the
5 board voted unanimously, Mr. Klebahn included, to go out
6 with the number in the proxy, but the board ultimately
7 made this decision.

8 Q I'm sorry. What was Klebahn's, and I guess to some
9 extent Cribley's concern, about including the share price?

10 A They thought it wasn't a real price. They thought
11 that there were so many offsets and other adjustments that
12 the real price might have, in theory at least, been less
13 than the ALPS number, if you ever got to it. So they were
14 very concerned about putting out a number of \$175 and
15 raising people's expectations when they personally,
16 particularly Mr. Klebahn, did not believe that was an
17 honest number; that that was the number that would have
18 resulted had you proceeded.

19 Q But I think you testified it was a unanimous vote?

20 A It was. He agreed. He said we had a full and fair
21 debate, so to speak, and he went along with the rest of
22 the group.

23 Q Let's go to the Wattson Breevast issue. Was that
24 included in the supplemental proxy?

25 A It was, yes. But the proxy that the board saw was

1 without these changes we then made right after the meeting
2 to conform to what we agreed the board had agreed to.
3 Wattson Breevast -- it wasn't a strong debate on that is
4 what I would say. I think ultimately everybody said yes.
5 Once we sort of opened the door by describing Del Mar, we
6 probably ought to at least indicate that there is this
7 other possibility, and it was left for us to work out, the
8 language, which we did.

9 Q Looking at Exhibit 1369, the second page, third
10 paragraph, is that the description of the per share price
11 for Del Mar?

12 A 1369, second page?

13 Q Third paragraph.

14 A That's the description for Del Mar.

15 Q And it includes the share price?

16 A It does, yes.

17 Q If you could turn to the next page.

18 A Yes.

19 Q "Other proposals." Do you see that?

20 A Yes.

21 Q Is that the --

22 A Yes, it is.

23 Q -- general disclosure, correct?

24 A For Wattson Breevast, yes.

25 Q Now, if you look at the last sentence on this letter

1 it says, "If the board does exercise a definitive
2 agreement regarding a superior acquisition offer, it will
3 seek shareholder approval of that transaction at the
4 appropriate time."

5 Do you see that?

6 A Yes, I do.

7 Q There has been some discussion in this trial about
8 definitive agreement. What is your --

9 A This is an area where people are being victimized by
10 the jargon of the trade, I think, a little bit. There are
11 common references to letters of intent as opposed to
12 definitive agreements. Letters of intent are outlines
13 that nobody is bound by them. They tend to change quite
14 dramatically. And definitive agreements are the
15 agreements that actually bind the parties.

16 So even though letters of intent are often
17 referred to as "offers," they are not really offers,
18 because the other side can't just say "I accept" and have
19 a binding contract. So it is not in the contract sense an
20 offer-and-acceptance situation. But a definitive
21 agreement, once signed by one party and delivered to the
22 other, is that kind of an offer. It is an offer which, if
23 signed by the receiving party, is an acceptance and is a
24 binding agreement binding the parties.

25 Q Now, were you present at the board meeting when there

1 was discussion over the supplemental proxy?

2 A I was by telephone, yes.

3 Q Did you later attend in person board meetings?

4 A I did. Whether you call it one or two, I think it
5 was technically one that was adjourned to the following
6 day. That was on November 30th and December 1st.

7 Q Can you turn to Exhibit 163. I think it is the first
8 tab.

9 THE COURT: Well, before you do, since you are
10 being so candid with Del Mar, when you get down to the
11 last paragraph of Klebahn's letter, it goes into vagaries
12 instead of specifics. I thought, even though the letter
13 of intent was not binding, the purpose of this
14 supplemental communication was to advise the stockholders
15 what was effective and what was not.

16 You covered Del Mar, stating that they -- their
17 position. But there is nothing at all said about the
18 Wattson Breevast letter of intent. It says, "which
19 advised that the company has received a written proposal
20 from another interested party."

21 So that was Wattson Breevast?

22 THE WITNESS: That's correct, Your Honor.

23 THE COURT: And they had a specific number,
24 right?

25 THE WITNESS: No, Your Honor, they did not.

1 They had a number, but it was a number that was subject to
2 negotiation.

3 THE COURT: Didn't they make an offer of 170?

4 THE WITNESS: It was not an offer. Yes, their
5 letter referred to 170. The key disclosure here is that
6 Del Mar went away, and we still have a live customer, if
7 you want to look at it. That's all that we were talking
8 about. The L.O.I. Wattson Breevast was a proposal
9 outline. Now, if you compare --

10 THE COURT: Just a minute. You are going away.
11 Since you are trying to advise stockholders, and there is
12 confusion out there. You said there was confusion on
13 Del Mar, and there was also confusion on the Wattson
14 matter, and all it would have taken is to say: We
15 received a letter of intent from Wattson Breevast. This
16 is not a binding offer and, therefore, should not be
17 counted on.

18 Wouldn't that have served a much better purpose
19 than saying, "We received an unwritten proposal, an
20 unknown quantity, which at this time is non-binding"?

21 THE WITNESS: I think to mention the price that
22 they had put in would have led people to an unrealistic
23 expectation.

24 THE COURT: Even if you told them it was
25 non-binding?

1 THE WITNESS: Even if you told them it was
2 non-binding.

3 In this practice, I would testify that is almost
4 never done. The only time it is done is when there has
5 been a leak of the letter, like the Del Mar leak, and then
6 you have to somehow deal with it because of the uneven
7 information situation.

8 This -- as it turned out, they made significant
9 changes in this letter over time, and there were very
10 significant loan arrangements that didn't materialize.
11 For example, there was the whole problem of the
12 practicability of the offer, concerning the year-end
13 concerns. And at this stage you were early in their
14 process still. So you weren't quite sure where any of
15 this would go.

16 So to throw out that kind of expectation would
17 have, I think, put the company in a very difficult
18 position. They could have done it. They could do
19 anything along that line, but then they would have to give
20 periodic updates, and the practicality of doing that makes
21 it very difficult. You do run out of time to do it.

22 And so I think that the better decision was the
23 one they made, which was normally you wouldn't have said
24 anything about Wattson Breevast, but the reason they did
25 here is because the Del Mar going away thing led you to

1 the conclusion that there were no proposals, and they
2 didn't want to leave that out there.

3 THE COURT: Thank you. Go ahead.

4 BY MR. NAKASHIMA:

5 Q Let's turn to the November 30th/
6 December 1st meetings. Obviously you flew from
7 Los Angeles?

8 A On the 29th to Kauai.

9 Q And leading up to the board meeting, what were you
10 doing?

11 A Well, I got in late the night before because the
12 plane was delayed. So I met with Mr. Park for about an
13 hour or so and then as I recall -- excuse me -- back up.
14 Wrong flight. On the 29th, I came in. The plane was on
15 time that time and then I got lost finding my hotel. So I
16 got an unexpected tour of the properties. But I did come
17 back and find the hotel and then we started with an early
18 morning -- I think it was a 9:00 a.m. meeting the next
19 day. But I had no contact with any representative of
20 Grove Farm until just before the meeting.

21 Q Let's talk about the November 30th meeting. Looking
22 at Exhibit No. 163, it does show that you were present,
23 correct?

24 A That's correct.

25 Q And did you make any presentation at this

1 November 30th meeting?

2 A Yes. I made a presentation that had sort of two
3 technical aspects and then my conclusions concerning our
4 assignment. The first was, I discussed with the board
5 what I thought their obligations would be, in a general
6 way, without -- I dealt with sort of the general
7 obligations that all companies face in these
8 circumstances, and I used, by analogy, Delaware standards,
9 even though very clearly the Hawaii statute differs from
10 Delaware's.

11 MR. SIMMONS: Objection; move to strike.

12 THE COURT: Go ahead.

13 MR. SIMMONS: There has been no testimony to
14 establish that this witness is qualified to discuss
15 Hawaiian law.

16 THE COURT: We have already discussed Delaware
17 practices and Hawaiian practices. Did you discern that
18 there was some material differences?

19 THE WITNESS: Yes. And I also had Mr. Cribley
20 in the room to respond to those differences as well, who
21 is licensed in Hawaii.

22 MR. NAKASHIMA: I think he is testifying as to
23 his understanding, Your Honor, which I think is clearly
24 material.

25 THE COURT: I don't see where that is relevant

1 to what we are talking about here.

2 MR. NAKASHIMA: Let me try to narrow the issue.

3 BY MR. NAKASHIMA:

4 Q What were the topics of the presentation to the
5 board?

6 A Generally what directors, as a general matter, should
7 consider in connection with acquisition proposals that
8 were similar of this sort, using by analogy the public
9 arena cases, mostly those from Delaware, which are often
10 discussed, but they aren't necessarily controlling. And I
11 believe I told the directors that ultimately Hawaiian law
12 would govern this, and Mr. Cribley was there to discuss
13 that issue.

14 And secondly, the obligations under the business
15 judgment presumption, to be fully informed, which I
16 believe is law adopted across almost every jurisdiction at
17 this point. And Mr. Cribley had confirmed that he felt it
18 had been adopted in Hawaii as well. And then, finally, I
19 talked about our assignment to see whether we thought that
20 there had been fair dealing and that this fair dealing had
21 resulted in a fair price.

22 Q Starting with the third, what did you tell the board
23 about your evaluation of fair dealing?

24 A I thought that our investigation, which had out of
25 necessity been limited somewhat by time and scope, raised

1 no indications that there was any unfair dealing in the
2 process; that the bidding process that had gone back into
3 December of the prior year appeared to have been very
4 consistent with what you would hope you would see; that
5 the prices had risen from \$125 through to 152 and still
6 possibly, based upon the then status of Wattson Breevast,
7 it might even go higher.

8 But of the process, there seemed to be no
9 unreasonable favoring of anybody in the process. They had
10 entered into an agreement with ALPS, and that obviously
11 gave ALPS an advantage at that point in time. But that is
12 what is consistently done. Every process ends up with an
13 agreement with somebody who gets an advantage, and they
14 have preserved for themselves the ability to review
15 unsolicited offers, as long as they met the criteria of
16 the agreement. I pointed out to them that they were
17 obligated by that agreement, and so they weren't just free
18 to do whatever they wished here, but they had to take into
19 consideration the terms of that agreement.

20 I also said that I thought it was perfectly
21 reasonable to consider matters other than just price alone
22 in evaluating offers and that case law in other
23 jurisdictions, again, not necessarily relevant to Hawaii,
24 had allowed this. In particular, there is at least one
25 case in Delaware, I think many, that allowed -- considered

1 financing the feasibility of the transaction, the
2 background and capabilities of the bidder and also the
3 consequences if you don't do the deal.

4 And we turned to that element, and I was
5 convinced, based upon my review and discussions, that
6 there were legitimate concerns. There was termite damage
7 that would cost between 4- and \$5 million. My review of
8 the financial information indicated that they didn't have
9 that money.

10 That there was debt coming due at the end of the
11 year, or first of the following year, of about
12 three-and-a-half-million dollars, and it didn't have that
13 money.

14 That there were infrastructure projects needed
15 to make entitled properties saleable. And while I wasn't
16 convinced that I had extensive information about that, it
17 did appear that that was a significant amount of money as
18 well. And the company was, in effect, up against some
19 very serious deadlines.

20 Mr. Klebahn had written a letter indicating
21 that, at least -- indicating that he thought that, if all
22 things went bad and no acquisition was consummated, that
23 the company would most probably face bankruptcy.

24 Q Did you also discuss at either this meeting or the
25 following meeting Wattson Breevast?

1 A Yes. I think it was at the following -- you know my
2 recollection isn't actually clear about the two. I know
3 at the first meeting Mr. Cribley laid out in detail the
4 discussions with Wattson Breevast. In fact, I was
5 familiar with those because he kept us apprised as he went
6 along. So that was laid out.

7 But whether we deferred that, as we did any
8 decision about delaying the meeting or the closing, I
9 don't really precisely remember. I believe we did defer
10 any decisions, but whether we discussed in detail sort of
11 what Wattson Breevast was at the first or second meeting,
12 I'm not sure.

13 In any event, I did discuss that and concurred
14 with Mr. Cribley that there was no offer on the table;
15 that despite deadlines that had been established, at least
16 as early as November 7th and a continuous attempt to
17 contact people and to get their commitment, that there was
18 no commitment in whatever form, certainly not a definitive
19 agreement, and there was no assurance that there could be
20 financing. No deposit, which I think, considering the
21 amounts of the loans involved, I think that would have
22 been enough, without further things. I don't think they
23 would have walked away from four-and-a-half-million
24 dollars. But that would probably have been enough, but it
25 still was no commitment.

1 I was also personally influenced, and I called
2 it to the attention of the directors by two things that I,
3 frankly, never experienced before. These people had set
4 up due diligence meetings for November 13th and 14th and
5 never showed up. I understand that they had seen the
6 properties, and they had made other tours. But I have
7 never experienced somebody who didn't want to come and
8 kick the tires and see what people were doing, whether the
9 employees were going to stick around, what the properties
10 looked like and what the current developments were and
11 what people's current outlook was.

12 The second thing that surprised me is that they
13 set up a meeting to discuss the debt with the bank and
14 then never had that meeting. I think it was a telephone
15 meeting they had set up, and I don't understand that in
16 the context of this.

17 Again, the bank had to consent to any
18 transaction. It had a lien, as I understand, or at least
19 a negative covenant on everything. And for a buyer not to
20 want to know they were going to have a good relationship
21 or to seek an extension or to even to think they were
22 going to make this loan, to get the bank's agreement to
23 get their money back in some form, with a priority or
24 something else, that quite amazed me that they were not
25 there. And I did call that to the attention of the board

1 and said that I had not experienced anything of that sort
2 before.

3 Q Can you turn to Exhibit 163, the second page. Do you
4 see that side heading "Comparison of Wattson Breevast
5 Possibility with ALPS Agreement"?

6 A Yes.

7 Q Are these statements on this page consistent with
8 what you were telling the board?

9 A Yes. It is not the complete set of statements, but
10 yes.

11 Q You did note that the strength of the
12 Wattson Breevast proposal was that it was talking about a
13 7.8 percent premium?

14 A Yes. And they later then clarified that it was even
15 more -- more like a 12 or 13 percent premium, as I recall.
16 And I believe that, based upon the reaction of the board,
17 that had they had the definitive agreement or had a
18 reasonable expectation within a few days of a definitive
19 agreement, that they would have pursued that because in
20 the case of all the directors, except only possibly one,
21 they expressed the view: Do what you can to get -- we
22 would like to get the money. I think they would have
23 taken it had they thought it was a viable offer.

24 Q Do you recall which director was less enthusiastic?

25 A Pam Dohrman was less enthusiastic about this. She

1 specifically asked about the factors in the Hawaii law,
2 and Jim Cribbley responded to that, yes, there are factors
3 in the Hawaii law that permit people to consider other
4 than shareholder interests in situations like this.

5 I, for one, said, as a factual matter, there was
6 no offer on the table, and it wasn't even appropriate to
7 consider whether those would apply at this point in time.
8 And there was really no real need.

9 Q Can you turn to the third page of that exhibit?

10 A Yes.

11 Q Did you frame the issue to be the fact that the board
12 did not have before it a superior acquisition offer?

13 A Yes. That is a definition in the agreement itself.
14 It requires that there be an offer that can be accepted,
15 and while there isn't a direct reference to a definitive
16 agreement, that is really what a definitive agreement
17 means. It is something that has been accepted actually or
18 is presented for acceptance, and it defines all of the
19 relevant terms of the transaction, and that the board then
20 reached the conclusion that it is a superior offer, which
21 in this case I think would have been fairly easy. It was
22 at a price that was significantly above the ALPS number,
23 and they would be in breach of their fiduciary duties if
24 they did not present it to the shareholders. But we never
25 got to that, because we never got to step one in this

1 process.

2 Q Could you turn to the next exhibit, which is the ALPS
3 proxy, Exhibit 145. Do you have that in front of you?

4 A Yes.

5 Q I want to go to the appendix with the ALPS merger
6 agreement, particularly Bates stamp page A001966. It is
7 section 5.18.

8 A Yes.

9 Q First of all, as of 2000, were you familiar with this
10 type of provision?

11 A Yes. Well, there are some variations from agreement
12 to agreement. If you do have no solicitation and
13 fiduciary-out type language, this one is pretty
14 representative of the kind of thing that is done.

15 Q And can you explain what a fiduciary out is?

16 A Yes. It basically says that, even though I have
17 signed a binding agreement with a party -- and normally,
18 for example, I use the example, if you sell your house,
19 you normally sell it. And if someone comes along with the
20 next day with a higher offer, tough luck. It is not how
21 most things are sold. But in the case of businesses --
22 and it isn't always case -- it is not a requirement. The
23 boards often reserve the right, if they get to consider
24 superior bids, if they can be turned into an offer.

25 This particular agreement is quite typical. It

1 says that they won't actively go out and solicit such
2 things, having reached an agreement with ALPS on that
3 subject. But if they get unsolicited offers, they will
4 inform ALPS, which is entitled to know about them
5 contractually, and then they may negotiate. If they make
6 the preliminary judgment that this is likely to result in
7 that superior final agreement, which is referred to as an
8 offer, which is confusing here, but it is an offer of a
9 definitive agreement, then they can negotiate with this
10 person.

11 And if they reach a final judgment that it is a
12 superior offer, then they can sign the agreement, which
13 must be subject to the rights of ALPS under this
14 agreement, and ALPS in this case was fairly typical. It
15 had the right to either match the bid, the right of first
16 refusal, or to terminate the agreement and collect what's
17 commonly referred to as a break-up fee. In this case,
18 that was a \$1 million fee.

19 Q If you turn to the next page, subparagraph G has the
20 definition of "superior acquisition offer."

21 A Right. The idea is that it has to first be an offer,
22 and then you have to reach the conclusion that it is, in
23 fact, superior. So it had to be substantially the
24 company, in this case 75 percent, and it had to be on
25 terms that they think are more favorable in their good

1 faith and reasonable judgment. And also after consulting
2 with legal authorities, they should determined it would be
3 a breach of their fiduciary duties not to proceed forward.

4 Q Now, going back to the November 30th board meeting,
5 which is Exhibit 163, did you tell the board, even though
6 it was not a superior acquisition offer, they could defer
7 the vote at the shareholders' meeting the next day?

8 A Yes. That's really a different provision of the
9 agreement, but it was pointed out that Wattson Breevast
10 represented and requested a deferral; that ALPS had
11 indicated they would very much oppose a deferral. Had
12 threatened, I think -- I don't know how serious the threat
13 was -- but had threatened to do more than complain,
14 although in the time frame it is hard to imagine what they
15 could have done.

16 And under the agreement it was possible to
17 extend the meeting. That was pretty obviously, actually,
18 as far as December 11, which would be ten more days, and
19 it was possible to extend the closing before ALPS would
20 have an absolute right to walk away, to December 15th.

21 Q It looks like you are looking at the direction -- do
22 you recall the board instructed Mr. Klebahn to approach
23 ALPS again and defer the decision about postponing until
24 the next day?

25 A Yes. There was quite a bit of discussion about the

1 issues, and then I think I was one of the people who
2 suggested that -- and I don't think I was the only one --
3 I think some directors suggested it as well -- that given
4 the circumstances we should go back to ALPS and see if
5 they were willing to raise their offer, or to perhaps even
6 match the \$170, which I don't think realistically people
7 thought that was likely, I said: Look, we ought to try.
8 You can't be hurt for trying. You could benefit, and we
9 would get a much better idea about what ALPS' attitude
10 would be if we had a face-to-face meeting.

11 Q So did you attend a face-to-face meeting?

12 A Yes. Mr. Klebahn and I traveled to Honolulu, and we
13 met with Mr. Agee, the representative of ALPS. I was
14 there, Mr. Klebahn was there, and I know Mr. Case Senior
15 was there. I know there were others at the meeting. I
16 don't recollect who they were. I apologize to them,
17 because I think they actually participated, but I cannot
18 remember who was there.

19 Q Can you just summarize what Grove Farm's position was
20 at this meeting?

21 A Yes. There were actually two presentations.
22 Mr. Klebahn and I had slightly different ideas of what
23 might be more appealing to ALPS. So he presented one, and
24 I presented the other. He presented a concept that ALPS
25 should increase the price, perhaps all the way to \$170,

1 but I'm afraid he backed off of that number fairly
2 quickly, in order to -- what he referred to as buy an
3 early closing; that Grove Farm would waive its rights to
4 extend in exchange for the increase in price.

5 I took a slightly different approach, although I
6 supported that approach. He was the client in those
7 circumstances. I suggested that -- I was the first to
8 raise the question of indemnity and say: Look, I think
9 you are going to be responsible for whatever goes wrong
10 afterwards. You are acquiring the company, and you will
11 end up with whatever its responsibilities are, and I think
12 it would be in your interests to raise the price and avoid
13 potentially some of those issues. If, for example, you
14 raised it to \$170, that would effectively eliminate any
15 other concerns about Wattson Breevast.

16 Now, Mr. Agee -- I'll say this was a very
17 friendly meeting and certainly no raised voices or
18 anything of that sort. He found Mr. Klebahn's argument to
19 be -- he was not receptive in any way to his arguments.
20 And if he found -- if he wasn't receptive to Mr. Klebahn's
21 arguments, he was less receptive to my arguments with
22 respect to this.

23 He rejected, I think after consultation, but he
24 rejected both arguments, and he said he would go forward
25 on whatever the contract said and whatever their

1 obligations under the contract were; that they intended to
2 live up to them under the letter of the law.

3 Q So that was the afternoon of the 30th?

4 A It was afternoon of the 30th. Yes, it was.

5 Q Did you fly back to Kauai that night or the next
6 morning?

7 A That night.

8 Q Was there a board meeting before the shareholder
9 meeting?

10 A There was. I believe it started early in the morning
11 and the first issue was to report the outcome or the lack
12 of outcome from the meeting with ALPS. I believe we
13 discussed more the Wattson Breevast situation. Again, as
14 I said earlier, it could be that I confused the 30th and
15 1st in that regard.

16 Then we had an extensive discussion concerning
17 the possibility of extending the shareholders' meeting and
18 whether or not it would be in the interests to do that,
19 particularly whether there was enough of a chance that
20 Wattson Breevast would really materialize in that ten
21 days. Would those ten days make a difference? You know,
22 it was a judgment call to decide what to do at that point.
23 There were considerable downsides to extending, in that
24 you were just getting ever closer to these deadlines.
25 ALPS made it clear that they would be really upset if this

1 was done, and they were the bird, you know, that we had in
2 hand.

3 It was not -- it was not keep chasing these
4 other guys forever and ever and ever, and they had been
5 chasing them for a year. I think they made the judgment
6 that let's take what we have got at this point. The
7 downside doesn't justify the risk of continuing onward
8 here, and that was the decision.

9 First, on the meeting -- it was really two
10 decisions. The first was, do we hold the shareholders
11 meeting and then delay the closing? Well, in the meeting,
12 my recollection was that everybody voted in favor. They
13 had the proxies in hand.

14 Q Does that include director, Mr. Combs?

15 A That's my recollection, although I could be wrong on
16 that. He was on the phone, again, recording his vote. I
17 could have easily misunderstood that.

18 Q Can you look at Exhibit 163, the fourth page.

19 A Yes.

20 Q Under the subheading of "Determination to Proceed
21 with Shareholder Meeting." Do you see that? It says,
22 "The view of all directors was that the shareholders
23 should be asked to vote on the ALPS transaction at the
24 nine o'clock meeting."

25 Do you see that?

1 A Yes.

2 Q Is that consistent with your recollection?

3 A That's my recollection. Again, I would never argue
4 that my recollection is perfect.

5 Q Next it does say, "All directors, except Director
6 Combs, favor closing as soon as possible, while
7 Director Combs favored delaying closing until December
8 15th."

9 A That's correct. I remember it that way.

10 Q Is it your best recollection that all the directors
11 wanted to go forward with the shareholders' meeting and
12 vote?

13 A Yes, that's correct.

14 Q And Director Combs wanted to delay the closing until
15 sometime later?

16 A That's my best recollection, yes.

17 Q Did any other directors join in that view or
18 position?

19 A No. It was discussed, but I don't believe that
20 anybody else did.

21 Q Now, as of the morning of December 1st, had
22 Wattson Breevast signed a definitive agreement?

23 A No.

24 Q Had Wattson-Breevast put in any deposit or loan?

25 A No.

1 Q Now, did you attend the shareholders' meeting?

2 A I did.

3 Q Can you look at Exhibit 2196. Would you look down to
4 the report of other potential offerors.

5 Do you see that?

6 A Yes.

7 Q Do you recall that Mr. Klebahn did disclose by name
8 Wattson Breevast and their proposed share amount?

9 A I do. My recollection of exactly what he said is
10 imperfect. I recall him describing it, and I think he did
11 describe the amount. The minutes certainly reflect that.
12 I was not the preparer of the minutes.

13 Q Following that description, there was also a note
14 that Mr. Klebahn had noticed a lawsuit had been filed by
15 Michael Sheehan.

16 Do you recall that fact?

17 A Yes. We were aware of that fact after the meeting or
18 the day before, and we called it to the attention of ALPS
19 when we met with them. But they were already aware of it
20 at that time.

21 Q I'm sorry. So when you met with Mr. Agee in
22 Honolulu, that issue was already known?

23 A Yes, it was.

24 Q Was that part of your raising this indemnity issue?

25 A Exactly. Exactly. It was one of the motivations for

1 raising that.

2 Q Looking at the approval of the motion, it looks like
3 Ms. Sandra L. Day recorded that 98.9 percent had voted in
4 favor of the motion?

5 A Yes.

6 Q Do you recall that?

7 A I do.

8 Q That was essentially approving the ALPS merger?

9 A It was. That's exactly what it was.

10 MR. NAKASHIMA: Thank you. That's all the
11 questions I have.

12 THE COURT: It's time for a recess. Let's take
13 ten minutes.

14 (Recess.)

15 (Open court; proceedings resumed:)

16 THE COURT: Go ahead, counsel.

17 CROSS-EXAMINATION

18 BY MR. SIMMONS:

19 Q Good morning, Mr. Connell.

20 A Good morning.

21 Q Nice to see you again. Do you know whether Morrison
22 Foerster did work for America Online prior to November of
23 2000?

24 A I don't know, but I don't believe it did.

25 Q Do you know whether it did any work for any other

1 entity related to Stephen case?

2 A I'm not aware, no.

3 Q Do you know whether they did any work for Steve Case
4 directly?

5 A Not that I know of.

6 Q And why not? How do you know that?

7 A I say I don't know. I believe that they did not,
8 mainly because a conflict check was done, and it came back
9 that we could undertake this representation. Now, if
10 something was missed in the conflict check, I didn't know
11 about it.

12 Q Okay. Do you recall testifying that the conflict
13 check came back, found no conflicts, "And that definitely
14 would have been a conflict. I'm pretty sure. They did
15 not do any work for Steve Case." Do you recall that
16 testimony?

17 A Yes.

18 Q Do you stand by that testimony?

19 A I do.

20 Q Thank you. How would that have been a conflict?

21 THE COURT: Wait a minute. Do you have any
22 evidence that there was a conflict?

23 MR. SIMMONS: Not for this witness, no. Well,
24 no.

25 THE COURT: Or for his law firm?

1 MR. SIMMONS: But he was brought in, according
2 to some testimony, to look at this conflict issue on the
3 Case firm.

4 THE COURT: He already said he didn't find one.

5 MR. SIMMONS: But the testimony about his own
6 conflict check confirms that there was one.

7 THE COURT: Did you say that?

8 THE WITNESS: No, not that I know of, Your
9 Honor.

10 MR. SIMMONS: He says he didn't find a conflict
11 with the Case firm being involved.

12 THE COURT: Yeah.

13 MR. SIMMONS: But his own conflicts check for
14 his own internal process shows there would have been a
15 conflict if Steve Case would have been involved because --

16 THE COURT: That goes around in circles.

17 BY MR. SIMMONS:

18 Q Well, you couldn't have represented Steve Case,
19 right?

20 A That's correct.

21 Q Because he was on the other side of the deal, right?

22 A That's correct.

23 MR. SIMMONS: That's all I needed to ask.

24 THE COURT: Okay.

25 BY MR. SIMMONS:

1 Q And the background information on the transaction,
2 you got primarily from the proxy statement, correct?

3 A From the proxy statement, from Mr. Klebahn, from
4 Mr. Cribley, from Mr. Tanaka and from conversations with
5 directors, to the extent that I had them.

6 Q Right. And you never interviewed any director other
7 than Hugh Klebahn, outside the presence of the other
8 directors, correct?

9 A I'm not absolutely sure, but I think that's correct,
10 yes.

11 Q Did you ever pick up the phone and call any of the
12 directors outside the presence of the directors?

13 A No.

14 Q Do you recall having face-to-face meetings with any
15 of the directors one at a time other than Hugh Klebahn?

16 A No.

17 Q And your -- did you ever take steps to back-check,
18 other than talking to Hugh Klebahn, Tod Tanaka and
19 Jim Cribley -- let me ask you a slightly different
20 question.

21 The only time you talked to the other board
22 members, besides Hugh Klebahn, were at board meetings you
23 attended or by telephone or in person?

24 A Or at breaks.

25 Q Or at breaks. And you don't recall interviewing

1 anyone at a break outside the presence of anyone else?

2 A Well, I may have. That's why I qualified the others,
3 but, no, I don't recall anything else.

4 Q Outside of that context and the information that you
5 got at the board meetings or on breaks, did you -- what
6 steps did you take to back-check the procedural history
7 you saw on the proxy?

8 A We also looked at the documents that we had received,
9 some of which were described in proxy material, for
10 example, and some were not, because they were subsequent
11 to that time.

12 We had some correspondence. Mike Cohen talked
13 to people, other than the ones I talked to, to some
14 extent, but I think basically his contacts were the same
15 as mine.

16 Q Do you recall when I asked you whether you actually
17 interviewed the directors external to the board meetings,
18 you gave me a slightly more definitive answer? Read your
19 answer to that question.

20 "Did you actually interview the directors
21 external to the board meetings?"

22 Your answer?

23 A You never sent me this transcript for corrections.

24 Q It is the court reporter's job.

25 A I never got it, but I did get the transcript in

1 electronic form a couple of days ago.

2 Q Did you fill out an erratum sheet?

3 A No, no one ever asked me to.

4 Q You are aware that's part of the process, though,
5 correct?

6 A When requested, yes.

7 THE COURT: Would you answer the question now.
8 Just read it.

9 THE WITNESS: I apologize, Your Honor.

10 "And you spoke with the directors at those
11 meetings?

12 "Yes."

13 BY MR. SIMMONS:

14 Q "Did you actually interview the directors external to
15 the board meetings?"

16 A "Other than Mr. Klebahn, no."

17 That's that I said, and that's what I just said
18 again.

19 Q Go ahead and finish.

20 A "But I did interview Mr. Klebahn externally to the
21 meeting, yes."

22 Q And your testimony is you started work on this matter
23 in November, mid-November?

24 A Correct.

25 Q Do you recall that you weren't retained, though,

1 until November 27?

2 A That's the date of our engagement letter, which
3 often, regrettably, follows behind the actual commencement
4 of the work and that was the case here.

5 Q Okay. Do you know whether Hugh Klebahn told the
6 other directors -- in the future tense -- that they were
7 going to hire you?

8 A I don't know what he said.

9 Q You testified that you were involved in the drafting
10 of the November 21 supplemental proxy statement?

11 A Yes.

12 Q And you discussed changes internally that were to be
13 made to that with Jim Cribley, correct?

14 A The internal discussions were internal to my firm
15 with Michael Cohen, but I did discuss them also with
16 Mr. Cribley.

17 Q And I believe I wrote this down, and correct me if
18 I'm wrong. You testified these changes were made right
19 after the meeting that the board had agreed to. The
20 changes the board had agreed to were made immediately
21 after the board meeting, correct?

22 A Correct.

23 Q Whatever changes you had involvement and input into
24 would have been those changes, correct?

25 A Both -- there were some before and some after, as I

1 recall, but I believe the most important changes were
2 after, as directed by the board.

3 Q So the most important changes were done immediately
4 after the board meeting?

5 A Correct.

6 Q By you and Jim Cribley?

7 A Actually by Michael Cohen and myself, and I think
8 Mr. Cribley participated as well.

9 Q Those changes were done in the afternoon or early
10 evening of the same day of the board meeting, correct?

11 A Yes, because the material was sent out the following
12 day.

13 Q What changes were made after that?

14 A After it was sent out?

15 Q Yes.

16 A None were made.

17 Q After it was sent -- are you aware it was sent in the
18 evening of November 20th, after the board's changes had
19 been made, to the buyer?

20 A Yes. The buyer had a right to see the material
21 before it went out. I'm not sure of the timing. I was
22 not the person who did that.

23 Q So you weren't involved in the changes that occurred
24 after the boards changes were made, but before the buyer's
25 changes were incorporated, correct?

1 A I'm not aware there were any.

2 Q Nobody told you there were changes from the buyer?

3 A I was not aware of any.

4 Q Did I understand you correctly to testify that a
5 letter of intent is never binding?

6 A Well, "never" is a strong word. I guess there have
7 been some. But, yes, if there is a letter of intent, it
8 is never binding. Otherwise, it would be referred to as a
9 formal offer.

10 Q Would you agree there is a spectrum between a letter
11 of intent and signed definitive merger agreement?

12 A I'm not sure what you mean by "spectrum."

13 Q They are not my words. I'm asking you whether you
14 agree with them.

15 A I'm not sure I understand them, but I guess I'll
16 agree with them.

17 Q Your testimony that the Del Mar offer was not a real
18 offer, what was the basis for that?

19 A It never matured into an offer. It was an indication
20 of interest; not a binding commitment of any kind. It was
21 subject to specific conditions, including the preparation
22 of the definitive agreement, and it was withdrawn in any
23 event before it got far enough along in the negotiations.

24 THE COURT: That's why I asked you to tell us
25 all about Del Mar, because you don't have any definition

1 of the Breevast.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Neither one of them were enforceable
4 according to you?

5 THE WITNESS: That's correct.

6 THE COURT: Why is one and not the other?

7 THE WITNESS: The first one, the shareholders
8 had learned about the first one. A Del Mar representative
9 apparently had given them a copy, and they were
10 misinterpreting it to be a binding arrangement and thought
11 they had \$175 price, and we knew that it had gone away.
12 We wanted to correct that misimpression.

13 THE COURT: You had no idea what the
14 shareholders knew about the 170?

15 THE WITNESS: Well, we were pretty sure they
16 didn't, because there was a confidentiality agreement
17 among the parties. We had no indication that there had
18 been a breach of the confidentiality. And if we had known
19 that, we might have changed our view.

20 THE COURT: Go ahead.

21 BY MR. SIMMONS:

22 Q Your testimony is that you shouldn't be sending
23 letters of intent to shareholders?

24 A Yes.

25 Q So you, I take it, had a real problem that they had

1 sent Scott Blum's letter of intent directly to
2 shareholders?

3 A That was a special arrangement. I'm not sure I would
4 have done that arrangement, but they were seeking
5 pre-approval of the deal. That was a very unusual
6 arrangement.

7 Q You are saying you shouldn't tell shareholders --
8 whether you send them the actual letter of intent, you
9 shouldn't tell them about the letter of intent until you
10 have a definitive merger agreement, because there is
11 nothing for them to understand, right?

12 A If you don't have definite terms, it can be
13 misleading, that's correct.

14 Q Do you know why the company told the shareholders it
15 had a letter of intent with Honu before there was a
16 definitive merger agreement?

17 A No, I do not.

18 Q Having disclosed all prior letters of intent, why
19 wouldn't it disclose to the shareholders new letters of
20 intent?

21 A I don't believe that they did disclose all prior
22 letters of intent. They got close to a definitive
23 agreement, but not actually there, with Honu. Whether
24 they did with others, I don't know. I'm sorry, I don't
25 recall. I probably did know at the time, but I don't know

1 now.

2 Q You recall at the time that shareholders were told
3 very soon after the letter of intent with Honu was in
4 place that that was the state of affairs?

5 A I don't remember.

6 Q You don't have a recollection one way or another
7 whether they waited until they were almost at the
8 definitive stage?

9 A No, I don't. I don't really have a recollection.

10 Q Do you think if you are going to engage in a course
11 of conduct, vis-a-vis shareholders one way, it is fair to
12 shift ground on them and stop telling them information
13 without telling them: We are not going to tell you any
14 more?

15 MR. NAKASHIMA: Objection, argumentative.

16 THE COURT: No. He asked him if it was fair.

17 THE WITNESS: I think you evaluate each
18 circumstance on its merit, but some consistency is what
19 you seek to find. So you try to do that.

20 BY MR. SIMMONS:

21 Q In terms of whatever documents you got, I just want
22 to confirm this, those all came from the Case Bigelow &
23 Lombardi -- any documentary material that was provided to
24 you to review came to you from Case Bigelow & Lombardi,
25 correct?

1 A Not necessarily. Certainly the documents like ALPS
2 and the proxy statement and those sorts of things did, but
3 as I recall I actually got the financial statements
4 directly from the company because I didn't want to lug
5 them around. So I left exhibits off the proxy material.
6 We got e-mails copies, and they came from whoever they
7 came from. So we were on the copy list for some of the
8 people.

9 Q Let me come at it in a different way. Did you talk
10 to any other bidders?

11 A No?

12 Q That was not part of your authorized mandate, was it?

13 A Well, we talked to ALPS, but, no, not other than
14 ALPS.

15 THE COURT: When you say you talked to ALPS, you
16 can't talk to ALPS.

17 THE WITNESS: That's right. We talked to
18 Mr. Agee in that one meeting that I already referred to.

19 THE COURT: Well, I don't know whether you
20 talked to the partner of the law firm that hired your
21 firm, Dan Case?

22 THE WITNESS: I didn't really have the -- I met
23 him, and I guess in that sense, Your Honor, yes, I did
24 talk to him. But I didn't talk to him about any issue of
25 substance. I said "hello." And beyond that, he did not

1 participate in the meeting, the one meeting that I recall
2 him being at, other than to host it.

3 THE COURT: And you did talk to Cribley?

4 THE WITNESS: Yes. I talked to Cribley and
5 Tanaka, yes --

6 THE COURT: Who was the partner of Dan Case.

7 THE WITNESS: Who was his partner, Dan Case.
8 Absolutely.

9 THE COURT: You have the seller over here, and
10 the buyer over here, the agent for the buyer. You didn't
11 ever stop and talk to Steve Case, did you?

12 THE WITNESS: No, never.

13 THE COURT: It is either Agee or Dan Case,
14 right?

15 THE WITNESS: It was -- Agee had -- I don't
16 remember who was at the meeting, but I believe his lawyers
17 were there, so I did talk to his lawyers. He was
18 represented at the meeting and not by Mr. Case. It was
19 clear somebody else was representing him.

20 THE COURT: All right. Go ahead.

21 BY MR. SIMMONS:

22 Q You are aware that Randy Moore was a director?

23 A Yes.

24 Q Did you have an understanding whether
25 Randall Moore -- Randolph Moore had a relationship, direct

1 or indirect, with Stephen case?

2 A No, I knew of no relationship.

3 Q Do you recall whether any of the directors worked for
4 a company controlled by Steve Case?

5 A Not that I knew of.

6 Q Is that something that would have stood out to you?

7 A Yes.

8 Q That would have been information you would have
9 wanted to know?

10 A Yes.

11 Q Do you know why Del Mar walked away?

12 A No.

13 Q Did anyone tell you that they withdrew their
14 confidentiality agreement after a phone call in which they
15 learned that Steve Case was the buyer and there was a
16 right of first refusal and huge termination fee?

17 A They were told of the break-up fee and its amount and
18 of the whole process of right of first refusal, and they
19 withdrew their confidentiality agreement. But, you know,
20 was that the reason? I guess it might have been, but I
21 don't know. You would have to ask them what their reason
22 was.

23 Q Did you do that?

24 A No.

25 Q You are aware that as part -- shortly after

1 withdrawing -- or I should say the same day -- they faxed
2 over a letter stating they were very disturbed by events
3 that led them to that point?

4 A Yes, yes.

5 Q You were there to investigate the process in part,
6 correct?

7 A Yes.

8 Q You didn't call Del Mar and ask them why they were so
9 disturbed?

10 A I did not.

11 Q You recall the November 30 meeting?

12 A I do.

13 Q Are you saying that the request was made there for
14 \$170 a share, or \$3 a share more?

15 A If the request -- as I recall it was, there were two
16 elements of that. The request was \$170 but rapidly
17 declined to something in the vicinity of \$3 and actually
18 went below that, I believe, during the conversations.

19 Q You were at the board meeting that preceded that
20 meeting?

21 A Yes.

22 Q Do you recall the board's authorization and agreement
23 as to how it was going to be conducted that a request for
24 \$3 a share more was going to be made?

25 A No. What the board said was, as I understood it, was

1 that you are authorized to say: Yes, make a deal for
2 anything that raises the price by \$3 or more. If it is
3 less than \$3, you have to come back to us.

4 Q That meeting was held in Dan Case's office, correct?

5 A You know, I think so, but you could have taken me to
6 any office, and I wouldn't have known one from another.

7 So, yes, I think it was.

8 Q And your recollection, when I spoke to you, at least,
9 was that Mr. Case Senior, yourself, Mr. Klebahn,
10 Mr. Agee -- you had specific recollections of them being
11 there, and you believed that Jim Cribley was there,
12 correct?

13 A I no longer believe that, but I believe I said that.
14 Mr. Cribley, as I look back through the file of documents,
15 it was pretty clear he wasn't there, because he had other
16 things he was working on. But the people that I -- I
17 remember other people in the room, and I believe they were
18 Mr. Agee's lawyers, but, you know, I couldn't tell you for
19 sure. I just don't remember.

20 Q You would agree with me that taking a client into a
21 negotiation of a multi-million deal is practicing law,
22 correct?

23 A It is -- you know, I actually don't know the answer
24 to that question but to go -- it is frequently done in
25 negotiated deals; you go across boundaries. Perhaps it

1 may technically be. I don't know. I would have to get
2 advice on that.

3 Q Let me ask this a slightly different way. I'm not
4 trying to attack you, sir. You weren't there giving
5 business advice, were you?

6 A No.

7 Q And you didn't have co-counsel with you in that
8 meeting who were Hawaiian licensed, correct?

9 A No, not in the meeting, no, but I did have them
10 available outside.

11 Q As I recall, having had your transcript in front of
12 me, you testified that Dan Case was trying to convince
13 everybody in the room that he was neutral.

14 A Could I see that?

15 Q Absolutely.

16 A Thank you.

17 Q I asked you, "Who did you speak to at ALPS?" Can you
18 read your answer.

19 A I think he was trying to say that he was neutral or
20 not involved; sort of the gentleman host of the meeting.
21 Acting in any capacity, in a business capacity, but I
22 can't actually say what his capacity was while he was
23 there.

24 Q So when I asked you, "What was your perception
25 contemporaneously why he was there?" Can you read your

1 answer verbatim, the whole answer.

2 A "It was his office that it was held in, or his
3 conference room, and he acted more or less as the host of
4 this thing. I think he was trying to convince everybody
5 else he was neutral."

6 Q And I asked you whether you bought the "neutral act."
7 Do you recall that?

8 A Yeah. I said that I thought, you know, as a matter
9 of filial relationships, or whatever, we didn't view him
10 as a neutral party. He was his son's father.

11 Q You are a sophisticated person. So when Dan Case is
12 holding himself out as neutral, you are saying when,
13 enough to know that he is not, correct?

14 A I wouldn't know what his capacity was there. If
15 anything, he tried to encourage or at least acted like he
16 was trying to encourage an increase in price. But was
17 that an act or substance, I can't tell you.

18 THE COURT: In your entire career, have you ever
19 encountered a situation where your client, the Case firm,
20 a senior partner, is dealing with his own counsel, his own
21 partners as well as with, on the other side of the fence,
22 as his son's agent, where he is a buyer and connected with
23 the lawyers by partnership on the other side?

24 THE WITNESS: There are lots of things about
25 this transaction that are a little unusual, Your Honor.

1 THE COURT: I would say so. I wanted to know if
2 you have ever encountered it.

3 THE WITNESS: I can't recall a very similar
4 situation to this. I think I would characterize it a
5 little differently than you have, but that's the only
6 experience.

7 THE COURT: How would you characterize it?

8 THE WITNESS: Okay. Well, first of all, I think
9 that he was not -- this is very distracting, this hand
10 that is on the screen.

11 MR. SIMMONS: I'm sorry. That was not my
12 intention. I was trying to get ready to go fast.

13 THE WITNESS: I think that the way things went
14 here, Your Honor, and this was before we became involved.
15 When the Honu deal died, they were -- I guess using the
16 word "desperate" would be a strong term, but they were --

17 THE COURT: "They" being.

18 THE WITNESS: The directors of the company. And
19 the company was our client, not the law firm is our
20 client.

21 And when an opportunity arose to get another
22 bidder into the picture, particularly one that looked like
23 a bidder that could actually perform and who had sort of a
24 sponsorship of his father in this case, but he'll come in.
25 They will have that thing. They thought that was a good

1 thing for shareholders to do.

2 I don't think they were thinking that was a
3 conflict -- if there was a conflict, they obviously knew.
4 He disclosed it. He came forward and told everybody about
5 it. And they just thought, yes, okay, there is a conflict
6 here, but this is good for the shareholders. We ought to
7 get another bidder into the picture.

8 Then when it turned out that there were bidders
9 that might pay more later on, the directors became
10 concerned. And that's why they hired us. They tried --
11 in a sense, they tried to cure something by having us come
12 in and see whether we thought -- that this relationship or
13 something else --

14 THE COURT: After a binding merger agreement had
15 already been reached --

16 THE WITNESS: Yes.

17 THE COURT: -- without outside counsel.

18 THE WITNESS: That's correct.

19 THE COURT: I don't want to beat that to death.
20 I just wanted to get your experience and answer my
21 question.

22 Go ahead, Counsel.

23 BY MR. SIMMONS:

24 Q Mr. Connell, you were under the impression that
25 Dan Case was to essentially recuse himself from

1 representing other side, correct?

2 A That's correct. From a legal point. It was unclear
3 to me whether that commitment extended to a business
4 relationship, whether -- Mr. Case is of the generation
5 where business and law were much more merged than they
6 would be today.

7 Q Is there a different set of rules for people from
8 that generation?

9 A Absolutely not.

10 Q In fact, that was the generation that spear-headed
11 the adoption of the Rules of Professional Conduct over the
12 Canons?

13 A I don't know.

14 Q When I asked you how you know he recused himself, you
15 gave a slightly different answer. Read your answer here,
16 starting with "A."

17 A Yes. You want me to read it again?

18 Q Read that out loud.

19 A "Well, that he -- he had asked for a waiver from the
20 board, and we reviewed the waiver. We saw the waiver that
21 he had requested -- and part of the waiver, as I recall
22 it, I -- I did not have the waiver in front of me at the
23 time -- was that he would not represent either party in
24 the transaction as far as legal representation was
25 concerned."

1 Which is what I think I just said. That was my
2 understanding.

3 "His firm would continue the representation of
4 Grove Farm but without his participation in the matter."

5 Q And your understanding was that he was to be
6 sidelined, essentially, as far as any involvement in the
7 legal representation, correct?

8 A Correct.

9 Q So he wasn't going to be doing legal work directly
10 for his son himself, correct?

11 A Correct. Not on this matter anyway. I don't know
12 about other matters.

13 Q Did you know that he was giving direction to the
14 Carlsmith Ball legal team?

15 A No, I did not know.

16 Q Did you ever ask Dan Case that question?

17 A No, I did not.

18 Q Did you ever ask the Carlsmith team that question?

19 A No, I did not.

20 Q Did you ask Dan Case whether he was giving direction
21 to Tod Tanaka?

22 A Yes. Oh, did I ask Dan Case? No. I asked Tod
23 Tanaka. I am sorry.

24 Q Did you ask Dan Case if he was giving direction to
25 James Cribbley?

1 A No.

2 Q You saw no one -- you saw Dan Case. You were there a
3 couple of days in person, correct?

4 A Yes. I saw him twice, I believe, in person. I only,
5 frankly, remember the one occasion.

6 Q And you didn't see him acting on behalf of -- you saw
7 Dan Case acting on behalf of no one, correct?

8 A I was uncertain. I can't say. He might have been
9 acting on behalf of someone; it is just not clear.

10 Q I asked you: "You did not see -- you saw Dan Case
11 acting on behalf of no one, right?"

12 You answered?

13 A "That's right, previously."

14 Q In your deposition I asked that question?

15 A That's right. It is consistent. He wasn't acting on
16 behalf of any particular person that I could identify.

17 Q And is there a clear line between when a lawyer is
18 giving legal advice or business advice?

19 A No.

20 THE COURT: He has already been asked that and
21 answered that, as well as the previous question.

22 BY MR. SIMMONS:

23 Q Did you have an understanding how Morrison Foerster
24 was to be paid?

25 A We submitted billings based upon the hours worked.

1 Q You knew that Grove Farm -- or you were under the
2 impression, I should say, that Grove Farm was in severe
3 financial distress, correct?

4 A That's correct.

5 Q And you were told they had a shopping center they had
6 to put millions of dollars into in the first quarter of
7 2001?

8 A That's correct.

9 Q You were told they had three-and-a-half-million or
10 three-point-something payment due to First Hawaiian Bank
11 at the end of year, correct?

12 A Yes.

13 Q And you were under the impression that they did not
14 have the cash on hand or available resources to meet those
15 obligations, correct?

16 A That's correct.

17 Q So were you worried about getting paid?

18 A I was not personally worried.

19 Q You did not -- you know your firm got paid
20 eventually, correct?

21 A I don't know. I honestly never saw a bill.

22 Q To your knowledge, they weren't paid prior to the
23 vote, correct?

24 A No, I don't -- they couldn't have been, because the
25 time wasn't even submitted by then.

1 Q Prior to this engagement, there had been instances
2 that you were involved in or familiar with where your
3 offices -- where Morrison Foerster didn't get paid when a
4 transaction didn't go through, correct?

5 A It didn't get paid even when they did go through,
6 yes.

7 THE COURT: We are on a collateral matter.

8 MR. SIMMONS: I'm done with it.

9 BY MR. SIMMONS:

10 Q Your mandate did not include negotiating with or
11 discussing anything with any bidder, right?

12 A That's correct.

13 Q So even though you were in California and Wattson
14 Breevast were in California, you weren't permitted to talk
15 to them, correct?

16 A I wouldn't use the word "permitted." We didn't talk
17 to them, and we didn't ask to.

18 Q You never asked permission?

19 A Never asked permission.

20 Q And that's not what you were engaged to do, correct?

21 A That's correct.

22 Q So even though, according to you, you were brought in
23 because there was some other bidder involved --

24 THE COURT: You are going in high-gear again.

25 MR. SIMMONS: Sorry.

1 BY MR. SIMMONS:

2 Q The reason, as I took your understanding why the --
3 what the board's motive was in hiring you, they were
4 concerned that the law firm having to deal with what
5 appeared to be a real bidder, who could close, might be
6 impaired, correct?

7 A Correct.

8 Q Why didn't you ask or advise that your firm be
9 empowered to take over those negotiations rather than
10 monitor them based on discussions with Jim Cribley and
11 Hugh Klebahn?

12 A Well, I won't say that that was impossible, but that
13 would have been extremely difficult and disruptive --

14 Q Why didn't you ask to --

15 THE COURT: Wait a minute. Let him finish.

16 MR. SIMMONS: I apologize. I didn't realize.

17 THE WITNESS: You know, I think that what we
18 are -- this was an assignment to do an independent
19 investigation, and we took it at that. It took a while to
20 get up to speed. The negotiations were already -- Del Mar
21 was over before I would say we were really up to speed and
22 Wattson Breevast was well along. The first draft of the
23 agreement had already been sent out. So I question the
24 practicality of that, but I'll have to say: Did we really
25 think about it or ask, which I think was your question, we

1 did not ask to do that.

2 BY MR. SIMMONS:

3 Q And you did not ask or recommend that you participate
4 in every telephonic or written communication with Wattson
5 Breevast during the window that you were counsel?

6 A That's correct.

7 Q That could have been done or somebody other than you
8 as investigating counsel could have been brought in to do
9 that?

10 A That's correct.

11 Q Since we just touched on Del Mar just briefly, do you
12 know why they waited until Del Mar had gone away to make
13 disclosure?

14 A That was the issue they were disclosing. Because if
15 they had been continuing to do the negotiations with
16 Del Mar, I think the disclosure would have been
17 substantially different than the one that you saw, and I'm
18 not quite sure what would have been done. That's a
19 hypothetical situation we didn't address.

20 Q And they did not disclose the reasons why Del Mar
21 went away?

22 A To this day I'm not sure I know the reasons. They
23 withdrew. They were upset about the break-up fee, but who
24 knows what the reason was.

25 Q Why didn't you include in the Del Mar letter, the

1 November 21 letter, or the draft approved on
2 November 20th, a statement that when Del Mar's
3 representatives withdrew their confidentiality agreement,
4 they had stated they were disturbed by the process that
5 had led up to that point?

6 MR. NAKASHIMA: Objection; lacks foundation.

7 THE COURT: There is no foundation that needs be
8 laid.

9 THE WITNESS: You know, people are disturbed for
10 all kinds of reasons. I don't think that "disturbed" is
11 the issue. The issue is they have gone away. What
12 difference does it make if they have gone away; that they
13 were disturbed?

14 BY MR. SIMMONS:

15 Q You were there investigating the process?

16 A Right. But the fact that they were disturbed did not
17 lead us to conclude that the process had been unfair.

18 Q But it was information you considered in reaching
19 that conclusion, correct?

20 A That's correct. We saw it.

21 Q Why wouldn't a shareholder want to have access to
22 that same information and way?

23 A You could have disclosed every single comment that
24 everybody made in all the meetings, but all we were trying
25 to do was to tell them that Del Mar, which had an offer,

1 which could have been characterized -- or an indication of
2 interest -- it could have been characterized as \$175 was
3 not a real offer. It had gone. They had withdrawn.

4 Q Was not or was no longer?

5 A Well, it was not a real offer, and it was no longer
6 even an indication of intent.

7 Q And it was not a real offer using the definition --

8 A -- of offer and acceptance. An offer that we could
9 accept and have a binding agreement.

10 Q Did anybody go back to him and say: Change these
11 three sentences in here, we will countersign, and we will
12 have a binding letter of intent?

13 A I don't know.

14 Q Do you know that Jim Cribley did that for Scott Blum?

15 A I don't know.

16 Q From the perspective of the company, this process was
17 a zero sum game, correct?

18 A I don't understand your question.

19 Q It didn't matter to the company who owned the stock,
20 right?

21 A That's correct.

22 Q And the company had no dog in this hunt?

23 A That's correct.

24 Q Can you take a look at Exhibit 1345.

25 A I have it.

1 THE COURT: What number?

2 MR. SIMMONS: 1345.

3 THE COURT: I have that; but within the
4 document.

5 BY MR. SIMMONS:

6 Q I want to ask about the recommendation on the first
7 page.

8 THE COURT: Read it.

9 BY MR. SIMMONS:

10 Q Excuse me. It is on the second page of the proxy
11 statement.

12 A Of the letter or the proxy?

13 Q On the actual proxy statement.

14 A Second page of the proxy statement.

15 Q This is the copy. It says on the bottom, "The board
16 of directors believes" --

17 A "And recommends that you vote for approval of the
18 merger agreement," yes.

19 Q "The board of directors believes that the merger
20 agreement is fair and in the best interests of the
21 stockholders and recommends that you vote for approval of
22 the merger agreement."

23 Do you see that?

24 A Correct, I see that.

25 Q So the basis for the recommendation, since the

1 company had no dog in the hunt, was that it was in the
2 stockholders' best interest, correct?

3 A Yes.

4 Q And the Hawaii statute that you mentioned, did you
5 read that statute at the time?

6 A I did.

7 Q That is the authorizing statute that permits a board,
8 in certain circumstances, to weigh other factors, correct?

9 A That's correct. It also has a standard of care in
10 it.

11 Q I placed in front of the witness a copy of 414-221,
12 general standard for directors. I would ask that we focus
13 on Subsection B.

14 Is that the provision that recommends --
15 authorizes directors in certain circumstances to consider
16 other constituencies?

17 A Yes, it is.

18 Q The qualifying language at the beginning of that,
19 does it not, states that "It applies when the board of
20 directors is determining the best interests of the
21 corporation," correct?

22 A That's correct. That's what it says.

23 Q Those decisions are the decisions that are made in
24 day-to-day situations for the company, not what's at stake
25 when the entire company is being sold, correct?

1 A No, that's not correct. And it is very clear with
2 these statutes that have been adopted across a number of
3 different jurisdictions, that that's not correct.

4 Q You just conceded to me that the corporation had no
5 interest in this sale?

6 A As referred to here, "corporation" is the corporation
7 and its shareholder.

8 Q No, sir. Look at the next clause. They use
9 "constituency shareholders." It says, "In determining the
10 best interests of the corporation, a director, in addition
11 to considering the best" --

12 THE COURT: You are going way too fast.

13 Q "In determining the best interests of the
14 corporation, a director, in addition to considering the
15 interests of the corporation's shareholders," correct? It
16 says that?

17 A That's correct.

18 Q So the legislature knew, when drafting this, knew
19 that the shareholders of the company and the corporation
20 itself might have diverging interests and treated them as
21 separate constituencies, correct?

22 A No, I don't believe that was their intent at all.

23 Q How is this different than Delaware law?

24 A Delaware just has a general provision that the
25 directors will manage the affairs of the corporation.

1 Q I didn't ask you how it was different from Delaware
2 statute; I asked how is it was different from Delaware
3 law.

4 A Are we going to do a treatise on Delaware law here?

5 Q You opened this door. I didn't want it opened.

6 A Okay. Delaware law -- are you talking about in
7 circumstances like this or in general?

8 THE COURT: Well, just a minute. You objected
9 earlier about getting into this area. We are dealing with
10 Hawaii law. You have an interpretation of this. The
11 witness has an interpretation of this. And I'll make an
12 interpretation of this.

13 So we are going to leave it there. I'm very
14 concerned about our timing. It is ten minutes after
15 11:00.

16 MR. SIMMONS: I understand, Your Honor.

17 THE COURT: There was one thing, Mr. Simmons,
18 that you raised that left me with a question mark. You
19 asked if there were any changes made by the buyer after
20 the input of the witness, I think.

21 MR. SIMMONS: Yes, I did.

22 THE COURT: Were you inferring that there were
23 changes?

24 MR. SIMMONS: Yes.

25 THE COURT: By the buyer?

1 MR. SIMMONS: From the fax we have from
2 James Cribley to Steve Egesdal at 5:38 p.m. on the day of
3 the November 20 shareholders' meetings. It states, "Here
4 is the letter approved by the board." So we know that
5 this witness's changes were all made before that fax went
6 out, and the chain of documents that we looked at
7 yesterday all occurred after that and after this witness's
8 involvement. It involved, as Mr. Egesdal testified to,
9 things that were highlighted in by them. I was just going
10 to argue that since he didn't know --

11 THE COURT: You don't know anything about it?

12 THE WITNESS: I don't know of any changes that
13 were made after we were done. I may have known at the
14 time, but I certainly don't remember.

15 THE COURT: Or who made them?

16 THE WITNESS: No, I don't.

17 MR. SIMMONS: That's why I was trying to pin
18 down the chronology of when --

19 THE COURT: That's fine. He answered by other
20 evidence.

21 Any other areas?

22 MR. SIMMONS: I have a couple of areas I have to
23 cover with him. I have three tabs left and two or three
24 notes.

25 THE COURT: Okay.

1 BY MR. SIMMONS:

2 Q Did you tell directors they owed duties to
3 shareholders?

4 A Yes, I did.

5 Q Was your intention to imply that shareholders had two
6 choices: To continue talking with Wattson Breevast and
7 run the risk that ALPS walks away, or just take the deal
8 that's on the table? I'm sorry, the corporation.

9 A Essentially yes. Yes, essentially.

10 Q You were concerned, although nobody raised their
11 voice, they seemed to take a hard line -- I'm
12 characterizing -- not using your words -- at the
13 November 30 meeting.

14 A Well, I believe that they had given Wattson Breevast
15 sufficient time between their October 30 letter and the
16 November 30 meeting to get to a definitive agreement and
17 some sort of deposit or loan arrangement commitment.

18 They had laid this deadline out in advance. The
19 question was: You laid out a deadline, the people agreed
20 to the deadline, which apparently they did both on the 7th
21 and 10th of November --

22 Q Let me stop you there. What's your basis for saying
23 that?

24 A Those were the communications given to me by
25 Mr. Cribley and Mr. Tanaka, who were on phone calls, and

1 Mr. Klebahn, also, who, I believe, was on both of the
2 phone calls with the Wattson Breevast principals and
3 lawyers.

4 Q So you saw no written communication. This was
5 information they relayed to you orally?

6 A It was; that's correct.

7 Q I'm sorry to interrupt. I needed to know that.

8 A They had laid this out. They had reported on several
9 prior occasions that there were repeated commitments that
10 they would make the deadline. There were also the issues,
11 as I said, of the missed due diligence sessions and the
12 failure to contact the bank. And the question was, is
13 there realistically something that is going to happen here
14 and should we take any risks given the circumstance. They
15 knew pretty much where the vote was. They had the proxies
16 in hand at that point in time, and they made the judgment,
17 and I guess we are all here to see whether or not we are
18 going to second guess it, that they didn't extend it.

19 MR. SIMMONS: Objection. Move to strike the
20 last part of the answer, Your Honor, with respect to
21 second guessing.

22 THE COURT: Objection is overruled.

23 BY MR. SIMMONS:

24 Q What I was trying to ask you, and maybe I didn't do
25 it artfully, was: Was there a risk that if they continued

1 to postpone the meeting and continued to talk to Wattson
2 Breevast, postpone the shareholder vote, that ALPS would
3 walk away?

4 A I told them that ALPS had indicated that there would
5 be such a risk; that I, frankly, discounted that risk.

6 THE COURT: You discounted that ALPS had made a
7 binding offer?

8 THE WITNESS: Well -- and I thought they really
9 wanted to buy the property. Why would they walk away for
10 ten days? It is essential.

11 THE COURT: Well, they would walk away before
12 they would put up another --

13 THE WITNESS: They made that perfectly clear.
14 For more money, they weren't going to do it. Mr. Agee
15 said at the meeting on November 30, as I recall, in his
16 personal judgment that they had already gone too high.

17 THE COURT: My question was: You said if they
18 continued with the Wattson Breevast matter, it would raise
19 a risk that ALPS would walk away from their already
20 binding offer.

21 THE WITNESS: They had an argument that I did
22 not think had a great deal of merit to that effect, and I
23 reported that they had made that argument. But that was
24 the case. Was it realistic that they were going to go
25 away?

1 THE COURT: That's a different matter. That's a
2 subjective thing. I want to know the answer. You could
3 or could not -- if we are negotiating, and I give you an
4 offer and you say, well, that's interesting, I'll accept
5 it, but then you come back and say, no, I really want \$3
6 more --

7 THE WITNESS: Yes.

8 THE COURT: -- then at that point I can say, you
9 made a counteroffer; I withdraw my first offer. That's
10 contracts basics 101.

11 THE WITNESS: Right. I am sorry, Your Honor. I
12 didn't understand your question. Both parties said we
13 have got an existing agreement. The question is: Would
14 they be willing to amend the agreement for us to give us
15 rights or avoid problems under that agreement? I think
16 that was the context in which those discussions occurred.
17 Insofar as this question is concerned, the rights under
18 the agreement were not absolutely clear in their favor
19 that they could have a right to terminate, particularly if
20 the only thing that the directors did was extend the vote.

21 THE COURT: Thank you.

22 BY MR. SIMMONS:

23 Q Do you recall testifying that ALPS had threatened at
24 one point or another to declare a breach?

25 A Yes. They did on a couple of occasions. I think

1 they were sort of mild threats, but yes.

2 Q In fact, you said there would be a risk that ALPS
3 would allege they breached the agreement in some fashion
4 by not going forward with the meeting or other things, all
5 of which, by the way, ALPS threatened at one point or
6 another; whether they would have done is not known,
7 correct?

8 A That's correct.

9 Q And the next page you told me they never threatened.
10 Do you see that? I asked you, "Were they threatening to
11 sue you and enforce?"

12 A No, they did not ever threaten to sue and enforce.

13 Q You said, "No, they never gave threats."

14 A I apologize for that. I should have been more
15 specific to the question. No, they never threatened to
16 sue and enforce.

17 Q Okay. Did you have any knowledge as to whether ALPS
18 had assets on November 30th?

19 A ALPS was a shell company, but in its behalf there had
20 been \$500,000 in deposits put up, and I think that
21 Mr. Case Junior's reputation was well known.

22 THE COURT: Do you know if the \$26 million was
23 deposited in ALPS at the time of the merger?

24 THE WITNESS: Yes. It was actually deposited
25 before the merger. It was deposited on the 30th, I

1 believe. They announced that they were putting the money
2 in, and they expected the company to close. They were
3 taking the position: We have fulfilled every condition,
4 including putting up the money. Therefore, we expect you
5 to close once your conditions are fulfilled.

6 Q Did they put that money in after your meeting?

7 A I don't know when it was. It was reported to me it
8 was put in. I think it was before actually.

9 Q Not when did it occur, but when did you know?

10 A I don't remember whether it was then or the day of
11 the meeting that I learned about the deposit. The deposit
12 will speak for itself when it actually happened.

13 Q I'm trying to get your state of knowledge as you sat
14 in the November 30 meeting.

15 A I don't believe I knew that when I was talking to
16 Mr. Agee during that meeting.

17 Q Thank you. Did you ask Mr. Cribley what factors had
18 been considered by the board when the board voted to
19 accept the merger agreement?

20 THE COURT: Wait; slow it down.

21 BY MR. SIMMONS:

22 Q Did you ask Mr. Cribley what factors had been
23 considered when the board voted to accept the merger
24 agreement?

25 A I think I did. I don't have a specific recollection

1 today.

2 Q Did he tell you they considered any social factors or
3 things like that?

4 A I'm pretty sure -- again, I don't have a specific
5 recollection -- but I believe that he told me that he did
6 not.

7 Q And did he tell you they thought they had got
8 everyone the best price?

9 A Yes.

10 Q And were stockholders ever told that the board had
11 voted on bases other than best price?

12 A Not that I know of.

13 Q Do you recall your answer in that question in your
14 depo. was, "I don't recall anything in there that they
15 considered anything other than price," referring to the
16 stock proxy statement?

17 A That's correct. I don't and I would stand by that.

18 Q You were at the December 1 meeting, correct?

19 A Which one?

20 Q The shareholders' meeting?

21 A Yes.

22 Q And the stockholders weren't told there that other
23 factors were considered besides price, correct?

24 A Not that I recall.

25 Q In terms of the --

1 MR. SIMMONS: I'll try to speed this up,
2 Your Honor.

3 BY MR. SIMMONS:

4 Q You thought it was very important that this piece of
5 information -- first, let me step back. You keep talking
6 about a deadline you were told had been relayed to
7 Wattson Breevast on November 7th, right?

8 A Correct.

9 Q That deadline, as I take it -- I don't remember who
10 said it or not, but I know other people said that's what
11 happened -- Wattson Breevast was told it was December 1,
12 correct?

13 A I think it was November 30 is my recollection, but
14 the one day difference, how big a difference would that
15 make, but yes.

16 Q Do you recall the only deadline mentioned to
17 Wattson Breevast, according to even Mr. Hugh Klebahn, was
18 that there was a shareholder vote on December 1 --

19 A But that meant they had to get it done before then,
20 and that deadline -- we're just quibbling. It was what it
21 was. I remember it was November 30.

22 Q So you inferred from "We are having a vote on
23 December 1," that the deadline was November 30?

24 A We had numerous conversations. So I don't think it
25 was just inferring from the one deal. We were constantly

1 talking about deadlines.

2 THE COURT: Let's not talk about deadlines.
3 We're out of time.

4 MR. SIMMONS: Your Honor, I have got about three
5 or four more crucial areas I've got to cover with this
6 witness. I am trying to go quick, but then I go too fast.

7 THE COURT: I'll just deduct it from your
8 closing argument time.

9 MR. SIMMONS: At this point, if I have to do
10 that, Your Honor, I will. It is just that important.

11 THE COURT: I said go ahead, but we have got to
12 get through the testimony. We have several more witnesses
13 today.

14 MR. SIMMONS: They have taken as long as I have
15 doing their direct or cross-examine on a lot of my
16 witnesses. I'm going fast and tight today. I am doing
17 the best I can.

18 THE COURT: I didn't ask for a speech. Ask your
19 next question.

20 BY MR. SIMMONS:

21 Q The failure to show up at a due diligence meeting was
22 important to you, correct --

23 A Yes.

24 Q -- by Wattson Breevast?

25 A Yes.

1 Q You never called them and asked them why they hadn't
2 or if they, in fact, had not?

3 A I was told by the company they had not, and I did not
4 call them.

5 Q And you also testified that part of why that was
6 significant to you was because the banks had to approve
7 the transaction, correct?

8 A No.

9 Q You didn't say that?

10 A I did say that, but not because they failed to come
11 to the due diligence meetings.

12 Q You said it was surprising to you that they missed a
13 meeting with the bank because they were going to need bank
14 approval.

15 A Right. That was a separate meeting. That was that
16 telephone meeting they were trying to set up.

17 Q And I take it that the bank and Jim Cribbley would
18 know better than you about whether there was any consent
19 required, correct?

20 A I did review the loan documents at the time. So at
21 the time I believe I knew that, but, yes, you are right.

22 Q I'm showing the witness Exhibit 434. It is a joint
23 exhibit. It is an internal memo from First Hawaiian Bank.

24 Mr. Connell, do you recall seeing there was no
25 change of control covenant in the loan documents that you

1 saw?

2 A Yes.

3 Q Did Jim Cribley tell that you that his opinion that
4 neither bank's consent was required for the transaction?

5 A No, I don't recall that. He may have, and I may have
6 a faulty recollection. I just don't know.

7 Q That's fine. Was it significant -- I'm sorry.

8 With respect to this deadline, you had letters
9 coming in from Wattson Breevast, which they say over and
10 over again: We can meet the December 15th time frame,
11 correct?

12 A I would have to look at those letters again.

13 MR. SIMMONS: This is my last issue, Your Honor.
14 Sorry.

15 THE WITNESS: Let me cut this short. They were
16 certainly taking that position. Whether it was in
17 letters, or whatever, they said that they would meet --
18 they were aware that the outside deadline for termination
19 of the agreement was December 15, and they were insisting
20 that they could -- "Just give us more time," they said.

21 Q But they were evincing in October and November that
22 December 15 was the deadline, correct?

23 A No -- well, yes. Late November, yes.

24 Q Did you ever pick up the phone or write them or
25 suggest that Jim Cribley do that, to tell them: Hey, you

1 have got the number wrong; we told you earlier it was
2 December 1?

3 A I may have suggested it to Jim Cribley. I did not
4 call them.

5 MR. SIMMONS: Nothing further. I am sorry.

6 THE COURT: In all fairness now, did you get
7 through your key points?

8 MR. SIMMONS: Yes, I did. I have to take time
9 for my closing argument.

10 THE COURT: Thank you for your cooperation.

11 All right, sir.

12 MR. NAKASHIMA: I'll be very brief, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. NAKASHIMA:

15 Q Mr. Connell, could you look at Exhibit 1370.

16 A Yes.

17 Q Is this the black-lined version of the supplemental
18 proxy that you and Mr. Cribley worked on?

19 A Yes. It appears to be the one that Mr. Cohen and I
20 worked on, and I think Mr. Cribley was involved as well.

21 Q Can you compare 1370 with 1369 -- I think you will
22 have to take it out to compare just the first page. 1369
23 is the final supplemental proxy. I am not going to run
24 through the whole document. Can you see the changes that
25 you and Mr. Cohen had made on 1370 were incorporated into

1 13 --

2 A Yes. I would have to go through this obviously and
3 make a detailed comparison. But looking at it briefly, it
4 looks like they all were.

5 Q All your changes?

6 A Yes.

7 Q All your changes were incorporated into the final?

8 A I believe they were, yes.

9 MR. NAKASHIMA: Thank you.

10 THE COURT: All right. Thank you, sir.

11 THE WITNESS: Thank you, Your Honor.

12 MR. NAKASHIMA: The next witness will be Michael
13 Klausner.

14 Your Honor, we're not calling Stanford Carr. We
15 will be making an offer of proof. But because of time, we
16 are going to start cutting down some of our witnesses.

17 THE COURT: Thank you.

18 (The witness was duly sworn.)

19 THE WITNESS: My name is Michael Klausner.

20 M-I-C-H-A-E-L, K-L-A-U-S-N-E-R.

21 DIRECT EXAMINATION

22 BY MR. KIM:

23 Q Good morning, Professor Klausner. Thank you for
24 coming from China to visit with us. Can you state what
25 you do for a living?

1 A I am a professor at Stanford Law School.

2 Q What is your official title there at the law school.

3 A I am the Nancy and Charles Munger Professor of
4 Business and Professor of Law at Stanford Law School.

5 Q Where did you attend law school?

6 A I went to Yale Law School.

7 Q What did you do immediately after law school?

8 A I was a law clerk.

9 Q For who?

10 A I was a law clerk two years. One year was for Judge
11 David Bazelon; the other year was Justice Brennan in the
12 Supreme Court.

13 Q And currently, as a professor of law, what courses do
14 you teach?

15 A I teach -- currently it varies somewhat by year. If
16 we take a period of a few years, it would include the
17 basic corporate law course. It would include a corporate
18 governance seminar. It would include a course, Deals:
19 The Economic Structure of Business Transactions.

20 I teach a seminar that is slightly from the
21 corporate law seminars called Economics of Corporate Law.

22 Q And beyond teaching classes, do you also pursue any
23 academic research?

24 A Yes, I do.

25 Q What are the areas you research currently?

1 A My current research is an empirical study of
2 shareholder lawsuits. In the past I have done research on
3 takeovers and a variety of topics.

4 Q Do any of your classes deal with merger and
5 acquisitions and similar substantial corporate
6 transactions?

7 A Yes, they do.

8 Q Which classes would those be?

9 A Well, all of them would. The course that goes by the
10 full title Deals: The Economic Structure of Business
11 Transactions, which I'll refer to as "Deals." That's the
12 general term for it around the law school. Deals is a
13 course about transactions, and M & A transactions figure
14 fairly prominently in that course. The basic law course,
15 of course, has a segment on mergers and hostile takeovers,
16 and the seminar would include that as well.

17 Q And are you affiliated with the Stanford Directors
18 Forum?

19 A Yes. I am the co-director of that.

20 Q Can you explain what the Stanford Directors Forum is.

21 A The Stanford Directors Forum is a program that
22 Stanford Law School has with Stanford Business School in
23 which we put on a three-day program for corporate
24 directors, teaching them a range of topics running from
25 their legal duties to accounting to finance and strategy.

1 Q And does any portion of that course deal specifically
2 with mergers, acquisitions and other significant corporate
3 transactions?

4 A Yes, it does.

5 Q In addition to teaching the course to the directors,
6 do you also hear from the directors and learn yourself
7 information?

8 A Yes, I do. We spend -- in that particular program --
9 I'm involved in a number of programs like that, but in
10 that particular program, I would typically spend the full
11 three days with the directors on campus.

12 Q Are you currently involved in any research relating
13 to merger and acquisition agreements?

14 A Currently -- literally, currently, I'm pretty much
15 focused entirely on this empirical study of shareholder
16 lawsuits. Now, some of those lawsuits -- a fair number of
17 them are merger related. So in that sense this particular
18 project does touch on mergers, but the general topic is
19 the nature of these lawsuits in a variety of -- collecting
20 50 to 100 variables on 800 lawsuits, so it is a fairly
21 overwhelming task.

22 Q Let me ask a slightly broader question. Are you
23 involved in supervising any research relating to merger
24 and acquisition agreements?

25 A Well, I have a research -- I work with a research

1 fellow; I am his advisor. He is finished and is now
2 currently working on another topic involving mergers.
3 That project involves deal protection measures. It
4 includes provisions like the one that is involved here.
5 The fiduciary-out -- the no solicitation/fiduciary-out
6 combination. He is looking at a related provision called
7 a go-shop clause. So in advising him, I have been looking
8 at those sorts of clauses as well.

9 Q Professor Klausner, can you look at the second of the
10 two documents that are clipped in front of you. That's
11 Exhibit 2303.

12 A Yes.

13 Q Professor Klausner, were you retained by the
14 defendants in this matter to prepare a report?

15 A Yes, I was.

16 Q Is there a true and correct copy of your report?

17 A Yes, it is.

18 Q Does it contain a complete statement of your opinions
19 and the facts and bases of that opinion?

20 A I believe it does; it was my intent.

21 Q Thank you. Professor Klausner, in the interest of
22 time, we are not going through most of the part of the
23 agreement, but there are one or two things I want to
24 highlight.

25 Professor Klausner, in connection with the study

1 undertaken by the defendants, did you have the opportunity
2 to review the agreement and planned merger between
3 Grove Farm Company and ALPS Investment, LLC?

4 A Yes, I did.

5 Q If you look at the first of the documents,
6 Exhibit 670, does that appear to be a copy of that
7 agreement?

8 A Yes, it does.

9 Q Looking at the cover page, ALPS Acquisition Sub is a
10 party to this agreement. Is that correct?

11 A That's correct.

12 Q Is it common to use a similar sort of acquisition sub
13 in mergers of this type?

14 MR. SIMMONS: Your Honor, we will stipulate, if
15 necessary, for a reverse triangular merger on ALPS
16 Acquisition Sub, Inc., if it will speed it up.

17 THE COURT: That's fine.

18 MR. KIM: That's was the only question on that.
19 Thanks, Matt.

20 BY MR. KIM:

21 Q Professor Klausner, can you turn to page 30 of this
22 agreement; specifically section 5.12, information
23 delivered to shareholders.

24 A Yes.

25 Q Professor Klausner, before you got here today, had

1 you had an opportunity to review that provision?

2 A Yes, I did.

3 Q Is this provision a common provision in merger and
4 acquisition agreements?

5 A Yes, it is.

6 Q Now, I want you to turn to the next page, 31,
7 specifically section 5.17, indemnification of directors
8 and officers.

9 Do you see that, Professor Klausner?

10 A Yes, I do.

11 Q Prior to coming on the stand today, have you had an
12 opportunity to review that provision in detail?

13 A Yes.

14 Q Let me ask, of course, a general question. Is it
15 typical, in a merger, for the surviving corporation to
16 indemnify the former -- the directors of the acquired
17 corporation?

18 A Yes, it is.

19 Q And does this particular provision appear to be a
20 typical example of that kind of phenomena?

21 A Yes. In general, it is typical.

22 Q Beyond the agreement, do you know if there are legal
23 obligations for the surviving corporation to indemnify the
24 former directors of the acquired corporation?

25 A There is a -- yes. Now, I'm not expert in Hawaiian

1 law, but as a general concept the corporation has an
2 obligation to identify to a certain extent, and then
3 permission to indemnify to a greater extent, if it
4 chooses.

5 Q That's talking about indemnity generally. I'm
6 talking about the specific scenario of liabilities that,
7 in some sense, were carried by the old corporation as
8 opposed to the new corporation.

9 A That's correct. When two corporations merge, their
10 liabilities and contingent liabilities merge as well, and
11 this would be part of that, so, that's correct.

12 Q Going to page 33 and following, there is a section
13 5.18 and what I believe to be a related to section 5.19 of
14 33 to 34. Before testifying today, had you had an
15 opportunity to review these provisions in detail?

16 A Yes, I did.

17 Q Did you hear Mr. Connell testify about the nature of
18 these provisions?

19 A I did.

20 Q Would you also refer to them as fiduciary-out
21 provisions?

22 A The fiduciary out is part of the provision. It is a
23 no solicitation provision with a fiduciary out included in
24 it, that's correct.

25 Q Did you generally agree with Mr. Connell's testimony

1 about the nature of these provisions?

2 A I did agree with his testimony. I think the only
3 reaction I had is that these are present in the vast
4 majority of cases, something approaching 100 percent of
5 cases -- of transactions I have seen.

6 Q Can you give the Court some information about the
7 genesis or purpose of this kind of suite of provisions
8 relating to -- we will refer to them as fiduciary-out
9 provisions?

10 A Sure. Actually, Mr. Connell, I liked the way he
11 framed it. He contrasted it with the sale of one's house.
12 If I am going to sell my house, I signed an agreement. It
13 is sold and nothing else can happen. In the case of a
14 corporation, there is this extra complication, which is
15 the shareholders have to approve the agreement after the
16 directors of the company and the directors have approved
17 it. So there is this period in between. The question
18 therefore arises is: What happens if events change,
19 particularly another offer comes along in that period
20 between signing and closing?

21 Now, what buyers would like and pay quite a lot
22 for, if they could get it, would be an absolute locked up
23 deal. Sellers would like to do that in many cases as
24 well, if they are paid for it. Now, the law somewhere
25 along the way disallowed that and imposed on boards an

1 obligations during this period to continually adjust in
2 relation to facts that evolve to moment by moment, day by
3 day, act in the interests of shareholders.

4 So in other words, it could well have been in
5 the interests of shareholders to approve a deal, lock it
6 up at the outset, at the time of signing, subject to a
7 vote of yes or no, but that wasn't permitted. So what the
8 courts have done is put the boards in a position of having
9 to make this an ongoing determination.

10 In response to that, this sort of provision has
11 a contractual provision, has evolved such that that
12 fiduciary duty is defined more particularly and additional
13 provisions are added to it. So, for instance, the courts
14 now allow, and typically parties agree, that there will be
15 no ongoing solicitations. So in other words, fiduciary
16 duty doesn't have to extend that far. But if an
17 alternative offer lands in the lap of directors, they need
18 to contemplate it.

19 What these agreements now do is they work out
20 the dance in advance. What counts as an offer they need
21 to contemplate, what they need to do in response to that
22 offer, the extent to which that offer needs to be
23 communicated to the incumbent buyer, what needs -- what is
24 permitted to be communicated to the would-be third-party
25 buyer. So these agreements now implement that initial

1 court ruling or set of court rulings about how fiduciary
2 duty is going to be carried out during the period between
3 signing and closing. That's the history of it.

4 Q Thank you very much, Professor. One more area to
5 cover. If you could turn to paragraph 28 of your report.
6 Page 7.

7 A Yes.

8 Q And in paragraph 28, to summarize your explaining
9 what's commonly referred to as the due diligence process
10 section with mergers and accusations. Is that correct?

11 A That's correct.

12 Q Can you describe generally the type of information
13 that is provided to a potential -- to a company that has
14 shown interest, serious interest, in acquiring the
15 corporation?

16 A Yeah. Some people divide this into business due
17 diligence and legal due diligence. But what a would-be
18 buyer would want to know is pretty much anything there is
19 to know about the business of the company. That would
20 include the nature of its assets, the nature of its
21 liabilities, the nature of operations, the attitudes of
22 its employees. Anything there is to know about the
23 company that would relate to its value.

24 Getting toward the legal side, it would include
25 the nature of its contracts, the nature of its -- well,

1 you might want to look at its history, so minutes you
2 typically look at. If real estate is involved, you want
3 to look at title. You would want to look at environmental
4 issues.

5 The concept is that a seller wants to know, and
6 importantly the buyer wants the seller to know everything
7 there is know in order to get the highest price
8 possible -- if I had it backwards, let me correct myself.
9 The buyer wants to know and the seller wants the buyer to
10 know. Thank you.

11 Q Is the information provided in the due diligence
12 process limited to publicly available information?

13 A No, it is not.

14 Q How is confidentiality protected?

15 A Before the due diligence process starts, the buyer
16 would sign a confidentiality agreement.

17 Q Would it be typical to provide all of the information
18 that comes out in the due diligence process to the
19 shareholders of the target corporation to enable them to
20 decide whether to vote in favor or against the
21 transaction?

22 A No, that would not be typical. In a typical case,
23 that would be unworkable, and it is not the practice.

24 MR. KIM: Thank you very much, Professor.
25 That's all the questions I have.

M. Klausner - Direct

1 MR. SIMMONS: I have very few.

2 CROSS-EXAMINATION

3 BY MR. SIMMONS:

4 Q Mr. Connell, you have never served as lead counsel in
5 a complex corporate transaction, change of control,
6 correct?

7 A Actually, I'm Klausner. That was Connell before.

8 MR. SIMMONS: I'm sorry. I am tired.

9 BY MR. SIMMONS:

10 Q Professor Klausner, you have never served as lead
11 counsel in a complex corporate transaction or change of
12 control, correct?

13 A That's correct.

14 Q Did I understand you correctly, you said the law at
15 some point, as much as maybe a seller or buyer would want
16 to do it in a corporate context, prohibited an absolute
17 agreement without room for boards to adjust day to day
18 their fiduciary duties. Is that right?

19 A It imposed an ongoing fiduciary duty between the
20 period of signing and closing.

21 Q So it wouldn't be proper, after you sign an
22 agreement, to go in and tell the buyer to "pay me \$3 more,
23 I'll lock the whole thing up and you get a quick closing"?

24 A I don't think I would agree with that. I'm not
25 exactly sure what you mean.

1 THE COURT: He meant what he said.

2 THE WITNESS: Well, if a quick closing, as you
3 say, is consistent with fiduciary duty, coupled with that
4 additional price, then that would be fine.

5 Now, let me just make clear -- I think I
6 understand where you are going. If, still, between the
7 time of signing -- between that agreement and closing of
8 that agreement an offer came in and fiduciary duty
9 required the board to consider it, it would have to
10 consider it.

11 Let me make this clear. There are deals that
12 have simultaneous signings and closings, if you can do it.
13 You often can't do it, because you need to wait for the
14 shareholder vote.

15 THE COURT: Let's be very specific.
16 Mr. Simmons, give him the scenario we are dealing with;
17 then we don't have to talk about a lot of these other
18 things.

19 BY MR. SIMMONS:

20 Q Is it proper --

21 THE COURT: Ask him to assume as a fact.

22 BY MR. SIMMONS:

23 Q Assume that there is a definitive merger agreement
24 signed. Further assume that after that is signed, the
25 seller approaches the buyer and says, "I will effectively

1 give you a quick closing and break off negotiations with
2 another bidder if you give me \$3 a share more."

3 Is that proper.

4 A Yes, it would be proper.

5 Q Then why couldn't you do it on the day you sign the
6 merger agreement?

7 A You do could do it on the day you sign the merger
8 agreement if you can get that shareholder vote to be
9 essentially simultaneous. I think we are talking about
10 two different things. In your scenario, can you tell me
11 when the vote will occur?

12 Q I am sorry. The vote will occur two days out or 48
13 hours out, or 24 hours out, but it is not right then, and
14 it is required. Can I tell the buyer: I will give you a
15 quick closing and not talk to this other person for three
16 bucks a share?

17 A During that two days, you would still be obligated to
18 exercise your fiduciary duty. If that third party came in
19 during those two days and made an offer that you needed to
20 take, consistent with your fiduciary duty, the same
21 obligation would continue. You could still promise a
22 quick closing. There is no problem with promising a
23 faster closing. But if there were an intervening event
24 during that period, fiduciary duties would still have to
25 be exercised.

1 Q The purpose -- you were asked generally about the
2 purposes of a suite of provisions. I disagree with your
3 testimony, but I wanted to ask about 512 specifically.
4 Isn't it true -- tell me when you get there. It is page
5 30.

6 A Okay. I got it.

7 Q Isn't the purpose of that provision to give the
8 buyer -- isn't the purpose of that provision to give the
9 buyer some control or control over communications to
10 shareholders?

11 A The purpose is to allow some coordination between the
12 buyer and the seller; to minimize the possibility that
13 there is something incorrect in that proxy statement.

14 Q And this provision doesn't say you have an obligation
15 to notify us and consult with us or coordinate with us,
16 does it? It says: You have to have our approval,
17 correct?

18 A Does it not say "not be unreasonably withheld."

19 Q "And which approval shall not be unreasonably
20 withheld." It does say that. Do you think Grove Farm was
21 in a position to get in litigation over whether or not
22 approval had been unreasonably withheld?

23 A I think if approval was unreasonably withheld, they
24 would have no choice.

25 Q Okay. If they have the time and luxury to do that,

1 then why didn't they talk to Wattson Breevast?

2 A You have got to explain a little more about your
3 question.

4 Q You are saying, yes, they would have gone into
5 litigation over unreasonably withheld consent on
6 shareholder communication. I am saying if they had time
7 and money to do that, why then wouldn't they continue to
8 negotiate with other buyers?

9 MR. KIM: Objection. Argumentative.

10 THE COURT: I don't know if you can answer that
11 or not.

12 THE WITNESS: I'm not really sure what you mean
13 by that. You mean they had the resources to litigate this
14 if this came up? Is there a particular approval or
15 disapproval you are referring to?

16 BY MR. SIMMONS:

17 Q No. You are trying to say, I guess, it is something
18 less than control because your consent is subject to a
19 reasonable withholding provision?

20 A Right.

21 Q I am asking -- your report -- this just isn't about
22 what this agreement says, right. Your report says you
23 reviewed a slew of documents and depositions, right?

24 A Right.

25 Q So you know what happened in this process?

1 A Yeah.

2 Q So my question to you is: Was Grove Farm in a
3 position, if consent had been unreasonably withheld, to
4 litigate about and fight about it, or not? I am asking
5 the distinction between factual and legal control.

6 A I believe that if they were about to do this
7 transaction and consent were unreasonably withheld, and
8 they therefore could not do this transaction, I believe
9 they would have litigated, yes. I can't tell you how
10 expensive that litigation would be but --

11 Q I understand. And if they had the time and money to
12 do that, why couldn't they have taken ten more days to
13 talk to Wattson Breevast?

14 MR. KIM: Same objection.

15 THE COURT: Overruled.

16 THE WITNESS: Okay. So now the question is why
17 they didn't take ten -- I don't see a connection between
18 the two scenarios.

19 BY MR. SIMMONS:

20 Q Sure. If you have the time and money to litigate
21 before you go bankrupt, why don't you have money and time
22 to talk to a buyer that is going to potentially increase
23 what your shareholders are going to get, or even better
24 yet, trigger a counter from the existing buyer?

25 A Uh-huh. My understanding why they did not want to

1 take ten days to continue talking to Wattson Breevast was
2 not a concern about money or time. My understanding, and,
3 again, I'm only reading the record. My understanding is
4 that they did not want to do that because they were
5 concerned that they were going to lose the bird in the
6 hand, and Wattson Breevast was not a sufficiently serious
7 or certain offer. So the reason that you and I are
8 talking by each other, I didn't see that as a money issue.
9 That is a litigation cost issue.

10 Q Did you happen to notice if they had Stephen Case's
11 signature on any document?

12 A I don't recall seeing.

13 Q You don't recall?

14 A As I recall, I don't recall seeing.

15 Q Do you recall if they had Dr. Henry Samueli's
16 signature on a Wattson Breevast document, as an
17 individual?

18 A I recall there was a confidentiality agreement, I
19 believe. I recall seeing his signature on a document,
20 yes.

21 Q That document was their September 29 initial offer?

22 A Okay, yeah.

23 MR. SIMMONS: I'm trying to cut this down to one
24 or two questions --

25 THE COURT: Please keep going.

1 MR. SIMMONS: -- with the Court's indulgence.

2 BY MR. SIMMONS:

3 Q Did you see any communication to shareholders that
4 told shareholders that the board was considering anything
5 other than maximizing price?

6 A As I recall the proxy statement, there was a list of
7 factors and that factor -- those factors listed other
8 things. On the other hand, as I recall the cover page of
9 the proxy statement, it emphasized price -- I am sorry --
10 benefit to the shareholders on price.

11 Q When I asked you, did you see anything in the
12 communications to shareholders, the ones that you did see,
13 that told shareholders anything other than were out there
14 trying to maximize price, your answer was. Please read it
15 out loud.

16 A "As I sit here today, I recall that that was the
17 thrust of the communications. I don't know that it was
18 stated that way in each communication, but I believe that
19 management described to shareholders their judgment that
20 this transaction was in their interest."

21 Q Once you inform shareholders that this is what we are
22 trying to do; we are trying to maximum value. You tell
23 them that over and over again for a year. Do you think
24 management is still free to choose a non-value maximizing
25 path without telling shareholders that that's what they

1 are doing or why?

2 THE COURT: You are going too fast again. I
3 know you are trying to hurry up. You are in the position
4 like a mother is: You take the kids into a fast food
5 store and tell them to eat slowly. (Laughter) I told you
6 to hurry up, but don't speak so fast.

7 BY MR. SIMMONS:

8 Q Let me ask you to assume that the shareholders have
9 been informed by a company over the course of a year that
10 what we're trying to do is maximum value to return to you,
11 okay. Based on that assumption, do you think that
12 management is free to then choose a non-value maximizing
13 path without telling shareholders what they are doing and
14 why, if they choose criteria other than price, to be the
15 reason for the decision? That's my question.

16 A We say a reasoned decision. Let's talk about a
17 reason for a merger agreement is what we are talking about
18 here. So if that were the case, and they had said that
19 was their goal all along, and they changed their goal,
20 they would need in the proxy statement to explain their
21 decision. In any case, they need to explain their
22 decision in the proxy statement.

23 Q You indicated that if there was a material
24 misstatement or material omission in the description of
25 what management was doing, that would be potentially

1 problematic. Is that correct?

2 A Well, a material misstatement in a proxy statement
3 would violate the disclosure rules.

4 Q Including with respect to management's rationale,
5 correct?

6 A Any material misstatement would be a violation of the
7 rules governing the proxy.

8 Q You didn't see anything in the proxy that said, "We
9 chose to maximize value because of other factors," did
10 you?

11 A It is my understanding of the proxy is they explained
12 all the factors they considered, and there was a list that
13 went on for a page or a page and a half, but they also
14 said that they believed they were maximizing value.

15 Q Your answer in your deposition, when I asked you
16 that, "I did not see any statement that would fit that
17 exact description," you stand by it, correct?

18 A I stand by the statement that my understanding is
19 that they were maximizing value when they said that.

20 Q And, therefore, they wouldn't need to say: We chose
21 not to maximize value and ignored a higher offer, because
22 we thought it would be better for the community? Or the
23 company? Or the employees? Correct?

24 A If they agreed, explicitly decided not to take the
25 maximizing value, yes.

1 Q Do you think it is adequate disclosure to say
2 something at a stockholders' meeting, where the actual
3 shareholder vote occurs when you already have 98.6 or
4 .9 percent of the proxies in hand?

5 A Do I think it's adequate?

6 Q Do you think that's enough to tell the shareholders:
7 Oh, by the way, before we drop all the proxies in the
8 ballot box, we got an offer from Wattson Breevast for
9 \$176?

10 A If there were -- I mean, what the board needs to do
11 is inform all of the shareholders of the material facts.
12 If there is a material omission from the proxy, and it is
13 only communicated to some shareholders, that material
14 omission would still be a material omission.

15 Q Okay. Where you have shareholders on the mainland
16 and Australia and Asia, and those people aren't at the
17 meeting, as to them, it would be a material omission?

18 A You are assuming that what is being described at the
19 shareholders' meeting is material?

20 Q I am. I am asking to you assume that that's correct.

21 A Plenty of things at shareholders' meetings are not
22 material.

23 Q If disclosure of material information occurs at the
24 actual shareholder meeting, is that not a material
25 omission effectively?

1 A You know -- let me step back. You are asking me a
2 legal question that says: If information arises at the
3 moment of a shareholder meeting, or the day before a
4 shareholder meeting --

5 Q I'm asking if it is disclosed. Let's assume it
6 existed previously.

7 A Okay. If it existed at the time the proxy statement
8 was sent out --

9 Q Or at the time the supplement was sent.

10 A Any material information that exists when the proxy
11 is sent out should be included in the proxy.

12 Q Would you agree that, regardless what a company's
13 bylaws say, with respect to the time periods for
14 shareholder communications, where you have an
15 extraordinary transaction, you need to send out
16 communications in sufficient time for shareholders to get
17 them before they are being asked to vote?

18 A Again, in an extraordinary transaction -- if there is
19 something that requires a shareholder vote, you need to
20 send out a proxy, and the law requires that a proxy
21 contain material information.

22 Q So do you think a ten-day period is sufficient to
23 permit the company to transmit information that needs to
24 be received by shareholders all over the world where the
25 company will also be getting or will be expecting

1 potentially to get feedback and changes in votes from the
2 shareholders?

3 MR. KIM: Objection. It calls for speculation.

4 THE COURT: He can answer it yes or no.

5 THE WITNESS: I don't know what's involved in
6 communicating, but in this era I would expect that
7 information can be communicated fairly quickly, within ten
8 days.

9 BY MR. SIMMONS:

10 Q How about using the U.S. Mail, regular service?

11 THE COURT: Now, you are getting into
12 speculation.

13 MR. SIMMONS: That's what the company did do
14 here.

15 THE WITNESS: In the normal course it would
16 arrive within ten days.

17 BY MR. SIMMONS:

18 Q And how about a response?

19 A A response by whom?

20 Q By a shareholder who may or may not have been home
21 the day it arrived?

22 A You mean a vote?

23 MR. KIM: Objection.

24 THE COURT: You can save that for argument.

25 That's it?

1 MR. SIMMONS: That's it. Thank you.

2 THE COURT: Anything further?

3 MR. ALSTON: Nothing further.

4 THE COURT: All right. Sir, you came from
5 China?

6 THE WITNESS: This semester I am teaching in
7 China.

8 THE COURT: Did you come all the way back for
9 this?

10 THE WITNESS: I did. I guess it was bad timing.

11 THE COURT: Well, anyway, thanks for the long
12 trip.

13 THE WITNESS: Thank you.

14 THE COURT: By the way, the fast food story is
15 not my own creation. It is from adjunct speech
16 professor/lawyer Jim Wagstaff of Stanford. What are you
17 called now? You are not Indians; you are Stanford --

18 MR. ALSTON: Cardinals.

19 THE WITNESS: Yes. They changed it.

20 THE COURT: Have an uneventful trip back. Thank
21 you.

22 (Recess.)
23
24
25

D. Wong - Direct

1 (Afternoon session; open court:)

2 (The witness was duly sworn.)

3 THE WITNESS: Danton Wong. D-A-N-T-O-N,
4 W-O-N-G.

5 DIRECT EXAMINATION

6 BY MR. NAKASHIMA:

7 Q Good afternoon, Mr. Wong.

8 A Hi.

9 Q Could you just briefly summarize where you were born
10 and raised and education and employment.

11 A Sure. I born 1957, Lihu'e-Puhi, Kauai. Matriculated
12 from Punahou High School '75. Graduated from Stanford,
13 '79. Hastings Law School, '82. I was with the firm Case
14 Kay & Lynch at the time from '82 to '92. Since '92, I
15 have been with the present firm of Chunn Kerr Dodd Beaman
16 & Wong.

17 Q I have been waiting -- this is the last day of
18 testimony, so I have to ask you. Isn't Punahou the second
19 best private school in Hawaii? (Laughter)

20 A It is probably the first best on the West Coast.

21 Q Since graduating from law school, what is your
22 specialty and practice or emphasis?

23 A Real estate transactions; buying, selling and
24 developing.

25 Q Now, Mr. Wong, did you represent the Honu Group with

1 the possible acquisition of Grove Farm?

2 A Yes.

3 Q And what responsibilities or duties did you have?

4 A It was the normal scope of representation; assist
5 them in negotiating the purchase and doing the due
6 diligence on the process -- on the project.

7 Q In the second volume, can you turn to tab --
8 Exhibit 2260, volume 2.

9 A Okay.

10 Q Is Exhibit 2260 a true and accurate copy of your law
11 firm's invoices in connection with the representation of
12 the Honu Group on the Grove Farm acquisition?

13 A It certainly looks like our bill. I would have to
14 look through the whole thing, but it certainly looks like
15 it.

16 Q Can you focus on the first page.

17 A Uh-huh.

18 MR. SIMMONS: I will stipulate that it is.

19 MR. NAKASHIMA: I think it is stipulated in
20 evidence. I want to get the witness's testimony.

21 BY MR. NAKASHIMA:

22 Q Looking at the first page, were you retained, it
23 looks like, in the second week of May of 2000?

24 A Yeah. That's where this bill starts from. May 11,
25 2000. May 11. That's the first entry.

1 Q And your initials are DFW?

2 A Correct.

3 Q Who is JSN?

4 A John Nitao. He was one of the associates at that
5 time.

6 Q How about and CYH?

7 A Carolyn Hayashi. She was a paralegal.

8 Q ARB?

9 A Andy Bunn. He was an associate at that time, yeah.
10 He might have been a partner, but another attorney.

11 Q MN?

12 A Marilyn Ng. She is another paralegal.

13 Q GWK?

14 A Georgina Kwan, another attorney.

15 Q TDT?

16 A That was Tracy Tanaka. She was another attorney.

17 Q And I thought I saw LEC, which is Leroy Calone
18 (phonetic)?

19 A Correct, another attorney.

20 Q What I want you to do is speed this up. Correct me
21 if I am wrong, but as part of the due diligence, did you
22 and your associates have a number of meetings with
23 Grove Farm management?

24 A Yes.

25 Q Did you and your team tour the Grove Farm property as

1 part of the due diligence?

2 A Yes.

3 Q Going through the time records, I note, do you recall
4 that you and your team met with Hugh Klebahn?

5 A Yes. I'm sorry -- Hugh Klebahn is with --

6 Q Grove Farm.

7 A Yeah. Okay.

8 Q Allan Smith?

9 A Yes.

10 Q Mike Furukawa?

11 A Yes.

12 Q Sandy Day?

13 A I don't recall that name in particular.

14 Q Could you look at Bates stamp page 314, the last
15 entry of June 30th, FY was --

16 A Francis Yee. She is a paralegal.

17 Q Do you have any reason to doubt that she had a
18 conference with Sandy Day regarding financials?

19 A No, no reason.

20 Q Did you and/or your team meet with representatives of
21 Belt Collins regarding possible development of Maha`ulepu?

22 A Yes.

23 Q Do you recall you and your team either meeting or
24 having telephone conferences with representatives of
25 First Hawaiian Bank and Bank of Hawaii?

1 A Yes.

2 Q Actually there is an entry I want to clear up. Can
3 you turn to page 317. Do you see the second entry as
4 July 6th, with your initials?

5 A Uh-huh.

6 Q It says, "Analysis re: Bank loans. Meeting with
7 Allyn." That's Mark Allyn, who is a consultant for Honu?

8 A Correct.

9 Q "Moore." Do you know who that was?

10 A I think that was probably Randy Moore.

11 Q From?

12 A From Grove Farm.

13 Q Then it says, "First Hawaiian Bank and Bank of
14 Hawaii." Did you meet with representatives at that time
15 or is that some other designation?

16 A I'm not really sure what exactly that meant except
17 whether we met directly with them or they came over or
18 exactly what happened at that time.

19 Q Do you recall calling anyone at the banks, Bank of
20 Hawaii or First Hawaiian Bank?

21 A I don't have any specific recollection of any
22 particular time.

23 Q Could you turn to Bates stamp page 313. Look at the
24 second to last entry, 6-29, with your initials.

25 A Uh-huh.

1 Q Do you see there was a telephone conference with
2 Alton Kuioka at Bank of Hawaii?

3 A Yes.

4 Q That is Mr. Alton Kuioka, who is a bank president?

5 A Executive VP at that time. He is pretty high up.

6 Q You also had a telephone conference with Fred Shine
7 at First Hawaiian Bank?

8 A Right.

9 Q Was this all in connection with your due diligence
10 for Honu?

11 A Yes.

12 Q Do you recall talking to Deloitte & Touche, which is
13 Grove Farm's auditors?

14 A I don't remember anything specific about talking to
15 them directly.

16 Q Could you turn to page 311.

17 A Uh-huh.

18 Q You see your entry for 6-22.

19 A Yes.

20 Q And there is an entry about a telephone conference
21 with Lloyd Fujie --

22 A Yes.

23 Q -- about work papers? Do you see that?

24 A Right.

25 Q Do you recall reviewing the Deloitte work papers as

1 part of your due diligence?

2 A I don't remember specifically reviewing his work
3 versus other people in my team reviewing the work.

4 Q Fair enough. Do you recall you or your team --
5 actually I think it was Leroy Calone talking to
6 Ke-Ching Ning about the status of the Wallace Theaters
7 lawsuit?

8 A I do recall that, yes.

9 Q Did you or anyone on your team meet with
10 representatives of Chaney Brooks?

11 A Would you remind me who at Chaney Brooks that might
12 have been?

13 Q Hold on.

14 Could you turn to Bates stamp page 332. If you
15 look at the entry of August 15th for Ms. Yee, it is the
16 fourth entry.

17 A Sure.

18 Q You see that she had a telephone conference with
19 Clori Digney (phonetic) at Chaney Brooks regarding
20 updating rent rolls.

21 A Yeah, my team definitely talked with them about rent
22 rolls.

23 Q Did you or anyone on your team meet or have telephone
24 conversations with representatives of the Kauai Planning
25 Department?

1 A Again, I don't remember specifically that.

2 Q Turn to page 314.

3 A Uh-huh.

4 Q Look at 6-29, TDT.

5 A Right.

6 Q That was?

7 A Tracy Tanaka.

8 Q And it appears she traveled to Kauai to attend the
9 meeting with -- I believe Michael Furukawa from Grove
10 Farm, but with Dale Cua from the planning department?

11 A I do recall that, yes.

12 Q Now, in that second binder, could you turn to
13 Exhibit 2259, which is a document before your invoices?

14 A Okay.

15 Q Do you see that, Mr. Wong?

16 A Yes. Table of contents.

17 Q Was this the table of contents for the due diligence
18 materials held by Grove Farm?

19 A I believe so.

20 Q And this would include financial information. It
21 looks like it had an asset listing, the Jason Glover
22 agreement, rent rolls. Looking at No. 31, E & Y Levanthal
23 brochure on Puakea Development. Does that look right?

24 A Yes.

25 Q Going to the third page, do you recall that

1 Grove Farm provided tax map keys?

2 A Yes.

3 Q Do you recall a valuation by Aspen Venture Group
4 being provided?

5 A Yes.

6 Q And it looks like, No. 46, several shareholder
7 letters from the chairman, correct?

8 A Yes. Uh-huh.

9 Q In addition to the Grove Farm due diligence
10 materials, did you also obtain additional information from
11 Grove Farm?

12 A Yes, I believe we did.

13 Q There was some testimony that Mr. Mark Allyn was over
14 on Kauai for a number of weeks, I think it was. Do you
15 recall that?

16 A Yeah. He was over there for a period of time. I
17 forget exactly how long ago.

18 Q Was he doing due diligence on behalf of Honu?

19 A Due diligence, some investigations, yes.
20 Negotiations.

21 Q And did you personally ever travel to Kauai to look
22 at Grove Farm materials or properties?

23 A Yes.

24 Q How many occasions?

25 A I don't recall how many. At least once, if not a few

1 times.

2 Q I'm sorry. Going back to 2259, look at No. 5. Do
3 you recall being provided the Bank of Hawaii loan
4 agreements?

5 A Yes.

6 Q And same with No. 11, First Hawaiian Bank loan
7 agreement?

8 A Yes.

9 Q Now, could you turn to volume 1, and it is
10 Exhibit 2013.

11 A It is a letter dated November 14, 2000?

12 Q Correct.

13 A Yes.

14 Q Do you recall that after Honu dropped out of the
15 Grove Farm picture, that it sold its due diligence
16 materials to Wattson Breevast?

17 A Yes.

18 Q Could you turn to schedule A of 2013?

19 A Yes.

20 Q First of all, looking at schedule A, do you have that
21 in front of you?

22 A Yes.

23 Q I guess up to page 22, was this a list or inventory
24 of the due diligence materials maintained at your law
25 firm?

1 A Let me take a minute and take a look at the letter.

2 Q Sure.

3 A It is quite a few pages here. What was the question
4 again?

5 Q Was schedule A the due diligence materials on
6 Grove Farm maintained at your office?

7 A Yes.

8 Q Now, there is a schedule B. Do you see that?

9 A Yes.

10 Q That was separated out because that was Belt Collins'
11 consulting work done on behalf of Honu. Is that correct?

12 A Yes, it appears so. The letter recites that it was
13 environmental studies that had been prepared by Honu.

14 Q For purposes of my questioning, I want to exclude
15 schedule B and just talk about schedule A. First of all,
16 can you give an estimate to the Court on what amount or
17 size of due diligence materials did you compile and
18 maintain in connection with the Honu deal.

19 A You know, I don't really recall. Once we stopped the
20 project and put all the docs. away, I kind of put it in
21 the back of my mind. But the document boxes for this
22 transaction and the materials we got were numerous.
23 Definitely more than three; probably more than four or
24 five. But I don't recall.

25 Q Four or five long bankers' boxes?

1 A Regular banker boxes.

2 Q Can you turn back to volume 2, and I will try to run
3 through these quickly. You can use schedule A to verify,
4 but we pulled certain specific documents from your due
5 diligence files.

6 A Uh-huh.

7 Q Can you look at 2262.

8 A Okay. April 28, 2000 letter.

9 Q Right. Do you recall as part of the due diligence
10 materials you received was the subdivisional approval for
11 the 16.9-acre lot by the Po'ipu Golf Course?

12 A I don't exactly remember. If this is referenced in
13 our file, then we got it.

14 Q I'll represent to you that I quoted from your --

15 A We got it.

16 Q 2263?

17 A Uh-huh.

18 Q And let me do it in the negative. Do you have any
19 reason to doubt that you received a copy of the Hastings
20 appraisal on the Kukui Grove Commercial Village as part of
21 your due diligence?

22 A No, we got this. I recall this.

23 Q Same question on 2264, which is the Hastings
24 appraisal on the shopping center?

25 A Right.

1 Q 2265. Do you recall receiving the May 31, 2000
2 balance sheets and income statements?

3 A I don't have any -- I don't have any specific
4 recollection, but if it was in our files, then we got it,
5 yes.

6 Q Looking at 2264. First of all, do you know who
7 prepared this memo about a meeting with Belt Collins?

8 A 22 -- what number?

9 Q I'm sorry. 2266.

10 A I don't recall who prepared it.

11 Q Would it be someone from your office?

12 A I believe it was, yes.

13 Q This is about a meeting with Belt Collins, correct?

14 A Correct.

15 Q Can you turn to the next exhibit, 2267.

16 A Uh-huh.

17 Q Now, this is a letter from you to Mr. Cribley?

18 A Yes. June 22, 2000.

19 Q And this is confirmation of certain information that
20 was given to -- given to you or Mr. Allyn, I believe,
21 correct? Let me try that again. This letter confirms
22 your discussions with Grove Farm about providing certain
23 information?

24 A Right.

25 Q Would you turn to 2268.

1 A Yes.

2 Q Who is ARJ?

3 A Alex Jampel. He is an attorney with my office.

4 Q And did he do a summary of the First Hawaiian Bank
5 and Bank of Hawaii loans?

6 A Yes.

7 Q Could you turn to the next exhibit, which I believe
8 is 2269?

9 A Yes.

10 Q This is a memo from Tracy Tanaka from your office?

11 A Yes.

12 Q Going to the third page, she identifies pending
13 sales, including the Regency, Coastal Rim, Schuler and
14 Schuler Homes, correct?

15 A Yes.

16 Q If you go to the next exhibit, 2272, it's another
17 memo from Tracy Tanaka to Andrew Smith and cc'd to you and
18 others relating to kuleana relocation?

19 A Right.

20 Q And the first sentence says that Grove Farm provided
21 you with a copy of Max Graham's June 14th, 2000 memo,
22 correct?

23 A Correct. Uh-huh.

24 Q And it looks like Ms. Tanaka was comparing
25 Mr. Graham's memo with her analysis of the property map

1 regarding kuleana?

2 A Yes.

3 Q Would you look at 2273. Were you aware that
4 Chaney Brooks was a managing agent for Grove Farm on -- at
5 the shopping center?

6 A Yes, I recall that.

7 Q Do you recall you or your team receiving a statement
8 of cash flows regarding the shopping center?

9 A Yes.

10 Q 2274 is another memo from Tracy Tanaka. I guess it
11 looks like it is updating the sales by Grove Farm.

12 A Right.

13 Q Now, do you know if Ms. Tanaka was getting this from
14 Grove Farm or the Bureau of Conveyances?

15 A I believe it was through Grove Farm, because these
16 transactions had already occurred.

17 Q And 2275, I think this is an invoice from Ernst &
18 Young. Did Honu, or you, retain them to analyze the
19 Deloitte work papers?

20 A That's my recollection, yes.

21 Q 2276, do you recall receiving a statement of cash
22 flows for the land company, Grove Farm Land Company?

23 A Yes.

24 Q 2277. It looks like is another memo from Ms. Tanaka
25 relating to an undated partially executed agreement for

1 purchase of real property by Schuler. Is that correct?

2 A Yes.

3 Q 2278, this is a memo to you from Leroy Calone, and I
4 am sorry --

5 A LEW is one of our litigation paralegals whose name
6 escapes me.

7 Q Go to the third page, II, there is discussion about
8 the license agreement between Grove Farm and Glover?

9 A Yes.

10 Q 2280. Do you recall receiving corporate tax returns
11 for Grove Farm Company and its subsidiaries for year end
12 1999?

13 A I don't recall specifically receiving it. But if it
14 was in our files, then obviously we did get it.

15 Q 2281, the memo from you and Marilyn Ng summarizing
16 the Sears expansion lease?

17 A Yes. Uh-huh.

18 Q Can you go back to in volume 1, 2013. This is your
19 list of due diligence materials?

20 A Yes.

21 Q Could you turn to 8023410. It is page 6.

22 A Yes.

23 Q No. 40. Do you recall receiving the Kenneth
24 Leventhal Real Estate Group memoranda regarding the
25 Lihu'e-Puhi development?

1 A Yes.

2 Q Turn to the next page, No. 54. Do you recall
3 receiving the Regency purchase agreement as part of the
4 due diligence.

5 A Yes.

6 Q Page 10, Item 117.

7 A The Schuler agreement?

8 Q Yes.

9 A Yes.

10 Q Turn back to your time sheets, which is 2260 in
11 volume 2. I'm sorry.

12 A Okay.

13 Q Look at the second page, your entry on May 23rd. Do
14 you see that?

15 A Yes.

16 Q You had a telephone conference with Guy Combs Re:
17 Proposals?

18 A Yes.

19 Q I went through the time sheets, and I found nine
20 separate conversations with Guy Combs. Does that comport
21 with your recollection?

22 A Yeah. I had a number of conversations with
23 Mr. Combs. Nine. If that's what it says, that's what it
24 says.

25 Q Could you turn to Bates stamp page No. 306.

1 A Yes.

2 Q Do you see your June 4th entry?

3 A Yes.

4 Q And it looks like you had a meeting with Mr. Combs,
5 Mr. Allen, Mark Allyn. Do you know who is the second
6 Allen is -- A-L-L-E-N?

7 A I don't recall.

8 Q How about Katherine?

9 A I don't recall who they were.

10 Q Applegate is Tom?

11 A Tom Applegate.

12 Q He is a representative of Honu?

13 A Yes.

14 Q Abadir is Mona?

15 A Mona Abadir is with Honu as well.

16 Q Smith?

17 A Smith is Andy Smith.

18 Travis, I think that was a guy working with Andy
19 on Kauai at that time.

20 Q And this meeting was about Grove Farm and strategy?

21 A Yes.

22 Q Do you recall what was being discussed at the --
23 first of all, where was this meeting, if you recall?

24 A My recollection is the meeting was on Kauai.

25 Q And what do you recall about the substance of that

1 meeting?

2 A Not all together that much, I'm sorry. I don't mean
3 to be glib, but I don't recall what we discussed at that
4 meeting particularly.

5 Q Well, was there a discussion about the strategy to
6 approach Grove Farm in attempting to acquire all the
7 shares?

8 A I guess I'm trying to look at my time sheets and put
9 that meeting in context. I don't know whether that's the
10 first meeting or what. So -- to the best of my
11 recollection, it would be discussing the purchase of
12 Grove Farm.

13 Q Now, can you go to -- do you recall that Mr. Combs
14 provided Honu or you information on Grove Farm?

15 A Yes.

16 Q Can you turn to 2070 in volume 1.

17 A Okay.

18 Q On the first page, do you see the Pau (phonetic) file
19 number, 292?

20 A Yes.

21 Q And your initials?

22 A Yes.

23 Q Is this part of Pau files on Honu matter?

24 A Yes.

25 Q This particular page is entitled materials received

1 from Guy St. Clair Combs on May 16, 2000?

2 A Yes.

3 Q Turn to the next page. There is a two-page index?

4 A Yes.

5 Q Other than the cover, Pau page and the index, was
6 everything else in here provided by Mr. Combs?

7 MR. SIMMONS: Objection; foundation.

8 THE COURT: Do you know if this all came from
9 Guy Combs?

10 THE WITNESS: My recollection would be that it
11 all came from Mr. Combs.

12 THE COURT: Do you want to ask a question in aid
13 of objection?

14 MR. SIMMONS: I guess, how? Was it provided by
15 Mr. Combs to him, or did somebody else tell him that?
16 That was the basis of my foundation objection.

17 THE COURT: Ask him.

18 BY MR. SIMMONS:

19 Q Did Mr. Combs provide you personally with these
20 documents?

21 A I don't recall whether -- when we got these
22 documents. May 16th, is that the day -- does that
23 coincide with the day we met?

24 MR. NAKASHIMA: No, it doesn't.

25 THE WITNESS: I don't have any specific

1 recollection about how --

2 THE COURT: Maybe we can shortcut this.

3 Mr. Combs, you need to stand up and stretch.
4 Would you mind coming around and taking a peek at these.
5 Look at Mr. Simmons collection there. These are
6 attributed to you, sir.

7 MR. COMBS: Yes, sir.

8 THE COURT: Can you tell me --

9 MR. COMBS: It has been a long time, and there
10 are some pages in here that do not belong to me at all.
11 Matt has already uncovered this in the Honu deposition of
12 Andy Smith. Most of them are, but there are a number of
13 exceptions, about 10 or 20 percent.

14 THE COURT: Anyway, did you give them -- who did
15 you give them to?

16 MR. COMBS: I can't remember. I think it is
17 Mark Allyn. I think I gave them to Mark Allyn. He was
18 from Texas; I was from Texas. I think that's who I gave
19 it to. He was the negotiator and overall --

20 THE COURT: You know we are under tight time
21 restraint. Is there anything in there particularly that
22 you feel would be inappropriate?

23 MR. COMBS: I don't think so, but that's my
24 opinion. They were getting the confidentiality agreement
25 together and -- Grove Farm and they were talking about

1 that. It was actually signed on May 23rd, and it was
2 executed by Andy Smith and ARP (phonetic), somebody like
3 that, on May 29th.

4 So the ones in June, they were under the shadow
5 or umbrella of the confidentiality. I don't even know
6 that May 16th is correct. It might be. If that's what it
7 says, that's what it says.

8 THE COURT: It is an insolvable problem.

9 MR. COMBS: I accept whatever.

10 THE COURT: I appreciate your help.

11 MR. COMBS: A lot of these papers go way back,
12 like they were in the dark on how Grove Farm operated. I
13 had materials from '96, '97 and '98 that I gave that were
14 stale.

15 THE COURT: Thank you very much.

16 MR. SIMMONS: Can I ask him two questions?

17 THE COURT: Sure.

18 MR. SIMMONS: First of all, you know that there
19 are documents in here that you did and could not have
20 provided?

21 MR. COMBS: Oh, yes, there is about 10,
22 20 percent.

23 MR. SIMMONS: 7821. If you could turn to that.
24 Did you give him special committee meeting minutes?

25 MR. COMBS: Oh, no. No, I wasn't on the special

1 committee. I was not on the special committee. I had
2 asked to be, and when they refused that, I asked to have
3 the minutes. So I had no access to those --

4 THE COURT: We are getting a little out of
5 sequence here.

6 MR. COMBS: But definitely not --

7 THE COURT: Thank you. You say lack of
8 foundation. The foundation is that the vast majority of
9 this came from Mr. Combs; some did not that he has
10 mentioned on the record. Go ahead.

11 MR. NAKASHIMA: I wanted to make an offer of
12 proof, because Mr. Combs testified, under oath, that he
13 was unaware the date that Honu signed a confidentiality
14 agreement.

15 THE COURT: That's fine. Do you have any
16 questions of this witness?

17 MR. NAKASHIMA: I want to have it authenticated.

18 BY MR. NAKASHIMA:

19 Q The next exhibit, 2077 --

20 A Yes. Documents received on June 2nd, 2000 from
21 Guy St. Clair Combs.

22 Q And, again, the second and third and fourth page are
23 table of contents from your office?

24 A Yes. We compiled that table of contents.

25 Q Look at the fourth page, Bates stamped page 07516.

1 Do you see that?

2 A Yes.

3 Q It says, "More documents for files of Andy Smith.
4 Thanks, Guy."

5 A Yes.

6 Q And Andy Smith was a principal of Honu?

7 A Yes.

8 Q Now, I think you said that Mark Allyn was from
9 Texas -- I'm sorry.

10 MR. SIMMONS: He didn't.

11 MR. NAKASHIMA: I am sorry. Mr. Combs said
12 that.

13 BY MR. NAKASHIMA:

14 Q You didn't?

15 A Yeah.

16 Q In volume 1, can you turn to Exhibit 416.

17 A 416. Yes.

18 Q Now, were you aware that Mr. Allyn used the Office of
19 Anterra? You see the fax header?

20 A 416 is a fax to Jim from Randy Moore.

21 Q Right. The fax at the top, it has Anterra.

22 A I see it, yes. At the very top. Anterra.

23 Q Mark Allyn has testified that that is his fax number.
24 Do you have any personal knowledge of that?

25 A I recall him being in that office and sending things

1 from that office.

2 Q In looking at Exhibit 416, were you aware that
3 Mr. Allyn had faxed these materials to, I think it was,
4 Howard Hamamoto?

5 A What page?

6 Q Looking at these documents, were you aware that
7 Mr. Allyn had faxed materials about Grove Farm to
8 Howard Hamamoto?

9 MR. SIMMONS: Objection; foundation.

10 THE COURT: He is asking if he knew.

11 THE WITNESS: I don't recall.

12 BY MR. NAKASHIMA:

13 Q Can you turn to the second page of 416. Did
14 Mr. Allyn ever tell you how he received Grove Farm board
15 of directors -- a memo from Randy Moore to the other
16 directors, including Guy Combs?

17 A I don't recall.

18 Q By September 17th, Lehman Brothers had dropped out,
19 correct?

20 A I don't know exactly the date. Let's assume that's
21 the case.

22 Q Did you ever see a memo from Randy Moore to the board
23 of directors at Grove Farm talking about what response
24 they would have to that event?

25 A I don't recall.

1 Q Would you turn to Exhibit 150?

2 A Yes. This is the deal from Kobayashi?

3 Q Correct. Were you aware that Mr. Allyn had suggested
4 to Mr. Combs to retain Bert Kobayashi?

5 A I do recall something of that nature, but the extent
6 of the relationship and what it was about, I don't have a
7 specific recollection.

8 Q Do you have any recollection that Honu paid
9 Mr. Kobayashi's fees on behalf of Mr. Combs?

10 A I don't remember.

11 MR. NAKASHIMA: Thank you, Mr. Wong. That's all
12 the questions I have.

13 CROSS-EXAMINATION

14 BY MR. SIMMONS:

15 Q Good afternoon, Mr. Wong.

16 A Good afternoon.

17 Q Can you look at binder 203 in tab 2259.

18 A The second?

19 Q Yeah, the second tab.

20 A Volume --

21 Q 2259.

22 A Sure.

23 Q That's the table of contents?

24 A Yes.

25 Q Did you get any kind of due diligence checklist from

1 Grove Farm that included strategy advice on how to deal
2 with members of the board?

3 A No.

4 Q Did you get any information from Grove Farm or any of
5 its agents about exactly what other bidders were bidding?

6 A No.

7 Q Do you know -- are you positive that you got -- there
8 are some bank appraisals in here. Do you see those? Are
9 they in the small binder?

10 A Is that like 2263, the appraisal for Grove Farm
11 Commercial Village?

12 Q Yes. Are you positive you got those as part of this
13 due diligence?

14 A I'm pretty sure we did.

15 Q Did any representative or attorney for Grove Farm
16 provide to you a legal opinion that the Wallace Theaters
17 litigation would not affect the Sears lease?

18 A I don't recall anything about that.

19 Q So you don't remember getting an opinion saying: You
20 don't have to worry about this lawsuit; the Sears lease is
21 golden?

22 A I don't remember hardly anything about the Wallace
23 claim, frankly.

24 Q If you had gotten information to that effect, would
25 it have been recorded in your file in one of the papers

1 dealing with the Sears lease?

2 A Yes.

3 Q Did anyone tell you that you could get a discount
4 from First Hawaiian Bank on the loan?

5 A Did anyone tell us? No.

6 Q No one told you that. I am going to parse the
7 question. Exclusive of what your own work product was,
8 did anyone tell you that you can get the loan for less
9 than face value?

10 A I don't recall anything specific on that.

11 Q Would an eight-and-a-half-million dollar discount
12 opportunity have been something that stood out in your
13 mind if somebody had told you?

14 A Probably it would have.

15 THE COURT: Well, did anybody already tell you
16 it had been written off as a bad debt?

17 THE WITNESS: Judge, I recall hearing something
18 like that, where the bank was contemplating possible
19 write-offs, but I don't recall any amounts particularly.
20 And I don't recall the discussion about that.

21 BY MR. SIMMONS:

22 Q Did your firm do your own internal analysis of those
23 loan documents to understand the loans?

24 A Yes.

25 Q Did that cost money and take time?

1 A Yes.

2 Q Can we turn to Exhibit 2260. That's a bill, your
3 bill. Can you turn to page 313.

4 A Sure.

5 Q If you had learned on this call that there was -- I'm
6 looking at the 6-29 entry for you.

7 A Yes.

8 Q If you had learned on that call from Fred Shine or
9 anybody else on the call that there was a substantial
10 discount available, would you have recorded it there?

11 A Not necessarily.

12 Q If you had any discussions about potential discounts
13 on the loan, would they have been recorded in your bill
14 somewhere?

15 A No, not necessarily.

16 Q Do you have any specific recollection of anybody at
17 Case Bigelow & Lombardi telling you that you could get a
18 discount? I'm referring to you personally.

19 A No.

20 Q Did Dan Case ever tell you that negotiating with
21 First Hawaiian Bank was "doable"?

22 A No.

23 Q Can we assume that the individual matters that you
24 chose or your client and you together chose to analyze
25 further and do memoranda on were things that were material

1 to the decision process? For example, there is a memo
2 analyzing the Sears expansion lease. Was the reason that
3 was done is because it was something significant?

4 A Yes, yes.

5 Q When is the last time you talked to Guy Combs? I
6 tried to find the last one. I found a lot of references
7 to his name, but the early ones seem to all be talking
8 about him. Do you recall the last time you talked to him?

9 A No, I don't.

10 Q If you had a discussion, it would have been recorded
11 on your bill; the fact that it occurred, not the
12 substance?

13 A Yes.

14 Q When Guy Combs came in -- first of all, did you meet
15 with him face-to-face or was this phone call here on the
16 first page of the bill the first time, when you talked to
17 him on May 17th?

18 A This is on the first page of my bill?

19 Q It is "Re: Combs."

20 A I don't think we spoke to him.

21 Q Here we go. May 23rd.

22 A May 23rd. If that's the first entry that I had with
23 respect to a telephone call with Mr. Combs, yeah, that
24 would be the first time I spoke him.

25 Q Did Mr. Combs complain to you that he thought that

1 there was an effort to give the company to Scott Blum in a
2 no bid context?

3 A I don't recall that it was said in those terms.

4 Q Do you recall what you said about it?

5 A My recollection was that he was concerned that Scott
6 Blum was trying to get some special deal or something of
7 that nature. I don't recall exactly what else.

8 Q Do you have a recollection as to whether the
9 retention of Kobayashi or the referral over to
10 Mr. Kobayashi entailed an effort to open up the process?

11 A Open up the process with respect to Scott?

12 Q With respect to bidding generally with respect to the
13 company.

14 A I don't recall how that came about exactly.

15 Q Did Mr. Combs express to you that he had been
16 excluded from a committee that he wanted to be on to be
17 able to get information?

18 A Yes.

19 Q Did Mr. Combs, to your knowledge, ever ask to
20 participate in the purchase side of the transaction with
21 Honu? Was he an investor, in other words?

22 A My recollection was he was not.

23 Q In your discussions with him, did he appear to be
24 touting Grove Farm and trying to get a higher price, as
25 least the ones you were present with?

1 A I wouldn't characterize it in that context -- in that
2 way.

3 THE COURT: How would you?

4 MR. SIMMONS: Yeah.

5 THE WITNESS: My recollection is that he was
6 seeking what I would call a fair price for Grove Farm.

7 BY MR. SIMMONS:

8 Q Okay.

9 A That's all. I say that in context with what he
10 thought Scott Blum was trying to do.

11 Q He would do that through his own affair?

12 A Yes.

13 Q Did he tell you that he provided his overview of the
14 Grove Farm memo to other potential buyers?

15 A I don't recall that.

16 Q On page 313, who is Mr. Park, or Ms. Park? There is
17 a reference to "Park."

18 A My entry or someone else's entry?

19 Q DSW, the 6-29 entry.

20 A That might have been -- I can't say for sure but that
21 probably was Russell Park.

22 Q Can you turn to your entry for July 6th. It is on
23 page 317.

24 A Sure.

25 Q Do you recall anything about that meeting with

1 First Hawaiian Bank?

2 A I recalled meeting with the bank. I don't know
3 whether that was the only meeting we had with them. I
4 can't say my recollection is of that meeting itself, but I
5 do recall meeting with the bank, yes.

6 Q Do you have any recollection there was an offer or a
7 discussion that the loan had been written down at that
8 meeting?

9 A No.

10 Q With respect to your July 6th entry a little further
11 down --

12 A Yes.

13 Q -- who is Lombardi?

14 A That would be Dennis Lombardi with Case Bigelow.
15 They are called Case Bigelow now. Well, I don't know what
16 they are called. Case Lombardi Pettit.

17 Q Do you have a recollection -- excuse me -- that's not
18 your entry. Do you know why it would be significant to
19 get information to quiet title actions?

20 A Why it was significant?

21 Q Yeah.

22 A We were checking on status of title and, you know,
23 where the company stood on their quiet title actions; how
24 much more they had to go and that kind of stuff.

25 Q In the next entry it says here that you are seeking

1 status -- it talks about status of Schuler agreements not
2 received.

3 A I'm sorry? That's all the way on the bottom.

4 Q TDT. It is Tracy's entry. I'm sorry. Do you know
5 whether you guys had received -- your firm had received
6 those agreements and whether you had been trying to get
7 them?

8 A Well, based on just what we saw in my questions from
9 defendants' counsel, I believe we did get the Schuler
10 agreements.

11 Q You ultimately did?

12 A Uh-huh.

13 Q Do you recall that there was a question or still
14 uncertainty at the time Honu ceased to be involved -- at
15 the time of expiration in the letter of intent, whether
16 there were still questions outstanding as to whether those
17 agreements were going to go forward, the Schuler
18 agreements specifically?

19 A I believe that there was still a question in our mind
20 whether they would go forward.

21 Q Wasn't there still a question in your mind as to
22 whether or not Sears was going to proceed with the
23 expansion lease?

24 A That, I don't remember.

25 Q Did you care about the -- I'll withdraw the question.

1 I can make the argument. Can you turn to 2262.

2 A The April 8th, 2000 letter?

3 Q Yes. This relates to, among other things, a 16.9
4 parcel by the beach, correct?

5 A I would have to check, but it does relate to a final
6 subdivision.

7 Q The final subdivision lots are the ones recorded on
8 the map on the second page. I will come to that. Is that
9 correct?

10 A Yes.

11 Q The lots are the ones on the next page?

12 A Yes, I think so.

13 Q The S99-8 refers to the county file on that?

14 A Yes.

15 Q So if there was a subsequent action in this matter,
16 it would be indicated with that same number from the
17 County, correct?

18 A I believe that's correct.

19 Q Have I accurately filled -- I am not sure whether I
20 have read this correctly or not -- in these boundaries of
21 the particular parcel I was attempting to highlight here,
22 have I accurately highlighted that parcel?

23 A I have to read this.

24 Q Okay.

25 A I don't remember that's what it was.

1 Q It was a subdivision, which among other things,
2 created this parcel, I believe.

3 A From the letter it indicates that lot 2D was created,
4 so let me just check from that. This is small.

5 Q That's why I blew it up.

6 A That -- I think that's correct.

7 Q If I pull back, I want to ask a quick question.
8 What's on the other side of this line here? What's here?

9 A That is ultimately the shoreline.

10 Q Is this ocean frontage on that 16.9-acre lot?

11 A No.

12 Q No, it is not?

13 A I don't believe it is.

14 Q Where does the lot end? That's what I was trying to
15 ask.

16 A The lot ends where you have it.

17 Q You think there is another real estate parcel here?

18 A Possibly. I can't say for sure, but yes.

19 Q Is this the ocean?

20 A Outside of that is the ocean.

21 Q Thank you. If there had been a final, final entry
22 approving the actual subdivision maps that that letter
23 says you have to record, would that have been something
24 your client would have wanted to know?

25 A Say again?

1 Q The County says that you have to record your actual
2 map and get final, final approval before it is real. Do
3 you see that? It says that if you don't do that, all your
4 approvals become null and void. Would the entry of that
5 final approval, of the final maps, be something your
6 client would want to ultimately know?

7 A Ultimately, yes.

8 Q Can you turn to 2267. This is the letter confirming
9 the discussion with Mr. Cribbley?

10 A Yes.

11 Q As I understand it, on page 4 --

12 A Yes.

13 Q -- they told you that there were no outstanding sales
14 or offers to purchase the leased fee parcels. Do you see
15 that?

16 A Yes.

17 Q Did they tell you that Dixie Daniel had been trying
18 to buy her leased fee parcel for about six years?

19 A That name, Dixie Daniel, sounds familiar, but I can't
20 tell you why.

21 Q Did they tell you about any outstanding offers for
22 any other ones?

23 A I don't recall.

24 Q Did they tell you the theater owner was trying to buy
25 their parcel? Not Wallace Theater, the other one.

1 A Who is the other one?

2 Q Madeline Blair?

3 A I don't recall that name.

4 Q Can you turn to 2272. This is an internal memo about
5 kuleana.

6 A Yes.

7 Q Were these ones in the Wiata area under water?

8 A The Wiata? I don't recall the location -- I recall
9 the location. I recall Wiata, but nothing particular
10 about that.

11 Q If they were relocatable, that would matter?

12 A Yes.

13 Q So that would be important to know if they are
14 relocatable?

15 A Yes.

16 Q Was that the purpose of this memo, to inventory the
17 kuleana?

18 A Yeah, it was related to inventory. To take a look at
19 this and compare it to Max Graham's memo.

20 Q On 2275, the last assignment listed on the first page
21 for Ernst & Young, was to determine the tax basis and
22 assets. Do you see that?

23 A Yes.

24 Q Why was that significant? If you know.

25 A I don't know if it is particular. Obviously from a

1 tax-basis matter, it is important for a company.

2 Q Did you ever actually finalize a merger agreement
3 with the company by generating the definitive merger
4 agreement?

5 A No, we did not.

6 Q When did you learn that Stephen Case was the buyer?

7 A After we got out of the transaction with Grove Farm.

8 Q How soon after?

9 A I don't recall.

10 Q What was your reaction?

11 A A little surprised.

12 Q Did you provide your due diligence that you had done
13 to the company, or do you know if it updated its binders
14 based on your work?

15 A I don't know what they were doing; if they were doing
16 anything about it.

17 Q Did anyone at Case Bigelow or Grove Farm tell you
18 there was a room full of documents at Case Bigelow for due
19 diligence?

20 A I don't recall that.

21 MR. SIMMONS: Nothing further.

22 REDIRECT EXAMINATION

23 BY MR. NAKASHIMA:

24 Q Mr. Wong, getting back to your discussions, telephone
25 calls and meetings with Guy Combs --

1 A Yes.

2 Q -- did he ever tell you that he preferred land for
3 his shares rather than money?

4 A I don't recall that.

5 Q Part of the proposed letter of intent included a land
6 for shares component. Is that correct?

7 A If you could point me to that. But I don't have any
8 independent recollection right now.

9 Q If you don't recall, that's fine. You don't recall
10 there was a component where shareholders could get land
11 instead of money?

12 A I hesitate because I'm trying to think whether it is
13 this transaction we are talking about or another
14 transaction that we are talking about.

15 Q Did you did you ever retain any real estate
16 appraisers to do appraisals of the entire Grove Farm
17 property?

18 A I don't think we did.

19 Q Why not?

20 MR. SIMMONS: Him personally or his client?

21 BY MR. NAKASHIMA:

22 Q I am sorry. Your client or you.

23 A Like I said, I don't think we did. If you asked me
24 why we did not, I don't recall.

25 MR. NAKASHIMA: Thank you, Mr. Wong. No further

1 questions.

2 THE COURT: Anything further?

3 MR. SIMMONS: No, Your Honor. Thank you.

4 THE COURT: Let's take a ten-minute break.

5 (Recess.)

6 (Open court; proceedings resumed:)

7 (The witness was duly sworn.)

8 THE WITNESS: My name is Robert C. Hastings,
9 Junior. R-O-B-E-R-T, H-A-S-T-I-N-G-S.

10 DIRECT EXAMINATION

11 BY MR. KIM:

12 Q Good afternoon, Mr. Hastings.

13 Mr. Hastings, what do you do?

14 A I am a real estate appraiser.

15 Q How long have you been doing that?

16 A I have been doing that since way back into the '50s
17 when I worked for my father.

18 Q And has most of your work, between the '50s and now,
19 been in Hawaii?

20 A Since 1969, most of my work has been here in Hawaii.

21 Q Do you have any experience appraising properties on
22 Kauai?

23 A I do.

24 Q Can you briefly describe the nature of that
25 experience?

R. Hastings - Direct

1 A Yes. I have appraised all of the Princeville
2 properties; all of the Marriott properties. I was
3 involved as one of the co-developers of a 311-room hotel
4 at Kapa`a. And I have been -- first of all, my first
5 involvement with Kauai was when I was brought here by
6 Seagrower & Company, a sugar company. They had
7 plantations on that island, including Kilauea Plantation,
8 and I also had involvement with properties all around the
9 island, as an employee of Seagrower & Company, and later
10 on with the appraisal firm that I'm with now.

11 Q Did you have any personal knowledge with Grove Farm
12 Properties?

13 A Yes, I do.

14 Q In what capacity?

15 A When I came here, within the first week I was here in
16 Hawaii, I met with some members of the family, and I did
17 quite a number of tours around this part of the island,
18 the Grove Farm area.

19 THE COURT: When you say "the family"?

20 THE WITNESS: Jeffrey Wilcox Michaels was a
21 personal friend; somebody I met at that time. He was from
22 San Francisco, but he had been a member of the Wilcox
23 family.

24 THE COURT: Thank you.

25 BY MR. KIM:

R. Hastings - Direct

1 Q Mr. Hastings, do you have experience appraising
2 shopping centers?

3 A Yes, I do.

4 Q Can you explain at a very high summary level the
5 process by which, in Hawaii, shopping centers are
6 typically appraised?

7 A In Hawaii and throughout the United States at this
8 point in time, the income approach carried out through the
9 discounted cash-flow analysis is the primary approach to
10 evaluation of shopping centers.

11 Q And in terms of the income approach, is one of the
12 inputs into that analysis the rents generated by the
13 tenants in the shopping center?

14 A Yes.

15 Q And can you explain in a little more detail how you
16 go from the flow of rents into a set value at a certain
17 point in time?

18 A Well, it is a combination of the rents, the Common
19 Area Maintenance fees that are collected, other service
20 charges that are collected, then less all operating costs,
21 whether they have been provided through the CAM fees,
22 Common Area Maintenance fees, or whether they are covered
23 by the owner of the shopping center out of the income
24 stream.

25 So after you have eliminated the operating

1 expenses, you get down to a net income or net cash flow,
2 which is projected over a ten-year period of time and
3 discounted back to the present date. This is so
4 standardized throughout the United States that we follow
5 pretty rigid standards.

6 Q Can you turn your attention to Exhibit 2264, which
7 would be the first document in the stack in front of you?

8 A Yes.

9 Q This is a limited summary appraisal relating to
10 Grove Farm Shopping Center and dated May 2000.

11 A Yes.

12 Q In May 2000, did you do an appraisal -- in or about
13 May 2000, did you do an appraisal for Kukui Grove Shopping
14 Center for the Bank of Hawaii?

15 A Yes.

16 Q I want you to keep that out and also look at
17 Exhibit 2304.

18 A Yes.

19 Q Do you have that in front of you?

20 A I do.

21 Q Is that a summary appraisal with respect to the Kukui
22 Grove Shopping Center with an effective date of
23 December 2000?

24 A Yes.

25 Q And did you conduct that second appraisal in

1 connection with this litigation as opposed to for the
2 bank?

3 A We actually conducted both appraisals for the Bank of
4 Hawaii and then later on we were asked if we would update
5 and provide the Exhibit 2304 appraisal for litigation
6 purposes.

7 Q And comparing these two documents, that is
8 Exhibit 2264 and Exhibit 2304, did you basically conduct
9 the appraisal the same way, without regard to whether it
10 was for a bank as opposed to litigation?

11 A Let me explain. The first document is called the
12 limited summary appraisal. The bank had asked us to just
13 concentrate on the discounted cash-flow analysis in
14 processing the capitalized income.

15 In the second analysis, we provided that
16 discounted cash-flow analysis, and we also capitalized
17 stabilized net income, and in addition, we performed an
18 independent analysis called the sales comparison analysis.

19 Q So with respect to the cash-flow analysis, which you
20 testified was the commonly accepted way of doing shopping
21 centers, as to that particular analysis it was
22 methodologically the same as between the bank appraisal
23 and litigation appraisal?

24 A Exactly.

25 Q And I should have gone over this earlier, but

1 approximately what percentage of your appraisal work is
2 for litigation as opposed to the business world?

3 A I would say probably only about 10 percent for
4 litigation purposes -- 10, 15 percent, something like
5 that -- and then there is a lot of arbitration work that
6 is done, too.

7 Q Generally speaking, is the way you do appraisals for
8 a bank, for example, the same as the way you do for
9 litigation?

10 A Yes. There are some small differences which are
11 brought about by bank regulations.

12 Q So turning again to these two documents, that is 2264
13 and 2304, can you turn to table III (1).

14 A Yes.

15 Q I specifically want you to focus on the property that
16 is been labeled as G-0 on the second page of that table.

17 A Yes.

18 Q You have that designated as K-Mart.

19 A In the May 2000 appraisal, that space is occupied by
20 K-Mart. It is 42,150 square feet under a month-to-month
21 rent, and it is then paying \$9,000, or 21 cents per square
22 foot per month.

23 Q Turning to that same table, the analogous table, in
24 the December 2000 appraisal of Grove Farm, and is that
25 same area, the Kukui Grove Shopping Mall, now occupied by

1 a different tenant?

2 A G-0, with 42,150, is now occupied by Sears, and it is
3 effective with a lease beginning August 14, 2000. And at
4 that time, or as of December 2000, the rent being paid
5 was -- the minimum rent or base rent of \$10,537.50 or 25
6 cents per square foot.

7 Q Turning back to that table for May. What is the rent
8 being paid by K-Mart?

9 A \$9,000.

10 Q Mr. Hastings, if you go to the very first page of
11 Exhibit 2264.

12 A Yes.

13 Q Beside the cover page, what's the total of appraised
14 value of Grove Farm Shopping Center with the effective
15 date of 2000?

16 A \$12,778,000.

17 Q And turning to Exhibit 2304, with an effective date
18 of December 2000, what is the total appraised value of the
19 shopping center?

20 A \$13 million.

21 Q So comparing those two figures, and based on your
22 review of the other data in the report, did the financial
23 condition of the shopping center materially change between
24 May 2000, before the Sears lease, and December 2000, after
25 the expansion lease?

1 MR. MALLONEE: Objection. It is outside the
2 scope, and he has not been offered as an expert on
3 materiality.

4 THE COURT: Outside the scope of?

5 MR. MALLONEE: Of his initial report.

6 THE COURT: Well, I want to know what the figure
7 is. Whether it is or not, I'll need the information.

8 MR. MALLONEE: As to materiality.

9 MR. KIM: Your Honor, I meant that in a common
10 sense way, not a legal sense. I can use a different word
11 if it makes you feel more comfortable.

12 THE COURT: It didn't bother me. It is relevant
13 information that I want to have. So that's all I am going
14 to say. The objection is overruled.

15 BY MR. KIM:

16 Q Mr. Hastings, do you still have that question in
17 mind?

18 THE COURT: What was the appraised value?

19 THE WITNESS: The answer was \$13 million.

20 THE COURT: Yeah, I heard that.

21 BY MR. KIM:

22 Q Mr. Hastings, now looking at those total figures,
23 comparing the financial condition of the Kukui Grove
24 Shopping Center in May 2000, prior to the Sears expansion
25 lease, to its appraised value of the same shopping center

R. Hastings - Direct

1 in December 2000, after the Sears expansion lease, was
2 there any significant difference in the financial
3 condition between those two dates?

4 A There was not. There was very minor changes between
5 the two dates.

6 MR. KIM: Thank you very much, Mr. Hastings.
7 That's all the questions I had.

8 THE COURT: Well, now -- go ahead.

9 MR. MALLONEE: Can we have copy of Sears' lease,
10 Plaintiffs' 1270?

11 THE COURT: Go ahead, sir.

12 CROSS-EXAMINATION

13 BY MR. MALLONEE:

14 Q Good afternoon, Mr. Hastings.

15 A Good afternoon.

16 Q You said that the standard approach to evaluating
17 shopping centers was using a discounted cash-flow method.
18 Is that correct?

19 A It is the generally accepted approach that has
20 been -- that appears to have been made the standard by
21 buyers, sellers, REITs --

22 THE COURT: He asked you if you used that
23 approach.

24 THE WITNESS: That's what I used, yes.

25 BY MR. MALLONEE:

1 Q What discount rate did you use in this report in the
2 summary appraisal of the market value for Kukui Grove in
3 December 2000?

4 A I'll have to look.

5 THE COURT: Do you know, Counsel?

6 MR. MALLONEE: I started looking as soon as he
7 did. I think it was 9 or 10 percent.

8 THE WITNESS: We used a 12 percent internal rate
9 return, or discount rate, and an internal capitalization
10 rate of 9 percent.

11 BY MR. MALLONEE:

12 Q Have you ever had your opinion excluded from a court
13 before?

14 THE COURT: That's not relevant. The only way
15 it would be relevant is if it was included before.

16 BY MR. MALLONEE:

17 Q Have you ever changed your opinion regarding discount
18 rates during the course of court proceedings?

19 A Not that I know of.

20 Q Did you provide an opinion in a case regarding
21 Queen's Beach?

22 MR. KIM: Objection; relevance.

23 THE COURT: Sustained.

24 THE WITNESS: Which Queen's Beach?

25 THE COURT: You don't have to answer it. I am

1 interested in this case.

2 BY MR. MALLONEE:

3 Q Did you review the Sears lease before you included it
4 in your report in this case?

5 A Yes. I believe I have read that lease.

6 Q Did you intentionally leave out the 4 percent
7 overage?

8 A The 4 percent over what?

9 Q The 4 percent overage, which is part of the lease,
10 did you intentionally omit that from your report?

11 A No. We did not omit it from the report. As it
12 happens, there was not enough sales revenue to kick the
13 overage into play.

14 Q Isn't this a retrospective report?

15 A Yes, it is retrospective. However, it is prospective
16 in the sense that it projects income into the future.

17 Q How would anyone have known the income at the time,
18 December 1, 2000 for a lease that was just beginning
19 December 1 2000?

20 A One has to make an analysis of the economy, and the
21 likelihood of there being an overage rent being paid in
22 the future.

23 Q Did you perform that analysis?

24 A Yes.

25 Q Did you put it anywhere in your report?

1 A Where it was required, we have projected overage
2 rents.

3 Q Can you flip in your report to III (1) that we looked
4 at earlier.

5 A Yes. For which date?

6 Q The December 2000 report.

7 A All right.

8 Q On the far right-hand side there is a column marked
9 "Overage Rent."

10 A No.

11 Q I do have on the screen table 31 from your report.
12 Is that the same one you are looking at?

13 A Yes.

14 Q I just zoomed on the far right-hand column named
15 "Overage Rent."

16 A Yes.

17 Q In that column, are there percentages for overage
18 rent for businesses which are leasing in the center?

19 A Yes.

20 Q Do those percentages come from the leases for those
21 particular businesses?

22 A Yes.

23 Q Is there a percentage for Sears?

24 A There is no percentage shown. However, in the ArcGIS
25 tables that back this up, they are shown.

1 Q Are there tables that back this up included in any of
2 the materials that Mr. Kim handed you a moment ago?

3 A I don't know.

4 Q The tables aren't included in there, are they?

5 THE COURT: He said he didn't know. Can you
6 report that there aren't?

7 MR. MALLONEE: I haven't seen them.

8 THE COURT: You've looked for them?

9 MR. MALLONEE: I looked for any percentage of
10 the Sears in there. I couldn't find it. He is saying,
11 now, he meant to leave it out.

12 BY MR. MALLONEE:

13 Q Do you have the Sears lease in your hand?

14 A Yes.

15 Q Can you flip to page 7. Look at section 4.02, which
16 describes minimum rent.

17 A Yes.

18 Q Does that correspond with the amount that you put in
19 your report?

20 A Yes.

21 Q Can you flip to page 8 and look at section 4.03.

22 A Yes.

23 Q Does that describe a percentage rent that is to be
24 paid by Sears to Grove Farm?

25 A Yes.

1 Q That percentage is 4 percent of sales over the
2 minimum rent, correct?

3 A Yes.

4 Q And that's not included anywhere in your report,
5 right?

6 A It is actually not over the minimum rent. It is a
7 percentage rent calculated against the minimum rent. In
8 the event there are sales in an amount great enough to
9 create percentage rents in excess of minimum rents, then
10 an overage rent will be projected.

11 Q Can you flip in your report -- I'm sorry. Did you
12 project revenues for companies that were required to pay a
13 percentage rent in your report?

14 A Yes.

15 Q Did you include a projection for the portion of the
16 Sears lease -- for the expansion of the Sears lease area?

17 A As I understand it, we did, yes.

18 Q Could you turn to table V-3 in your report.

19 Does table V-3 in your report show historical
20 gross sales data?

21 A It does.

22 Q Could you read the line for "J.O." near the bottom
23 that says, "Sears, Roebuck & Company." It is
24 approximately 34,000 square feet and what are the annual
25 sales?

1 A Yes. The annual sales is 7,831,000 in the year 1997.

2 In the year 2000, it is at \$11,349,500.

3 Q What's approximately 4 percent of \$11 million?

4 MR. KIM: Objection; foundation. This is an
5 entirely different lease than what he was testifying about
6 earlier.

7 MR. MALLONEE: That's my point.

8 THE COURT: Go ahead.

9 THE WITNESS: 4 percent of that would be
10 something in the neighborhood of \$400,000.

11 BY MR. MALLONEE:

12 Q Now, that's not the Sears expansion lease area, is
13 it?

14 A That would be all of Sears actually.

15 Q Actually could you flip to the previous page, table
16 V-2. Do you see the section "Similar" to go on the next
17 page, "Anchors, major tenants, J-2," the line you just
18 read, indicating the same 33,000 square feet. Do you see
19 that?

20 A Yes.

21 Q If you move up and you see "G-0, Sears," it shows the
22 expansion lease of 42,000 square feet. It shows the
23 minimum rent you read off. Isn't that what this table
24 shows?

25 A Yes.

1 Q If you go back to the other table, Sears is missing?

2 A Yes --

3 THE COURT: Let me finish.

4 THE WITNESS: As I understand it. The
5 percentage income was not generated in that space.

6 BY MR. MALLONEE:

7 Q Your projections for 33,000 square feet were for the
8 Sears space was in excess of \$10 million. That would have
9 generated \$400,000 of percentage rent?

10 A Your reasoning from one Sears space to another. I
11 think they are all different client types, all different
12 product types. There is no reason the sales are going to
13 be the same on a square-foot basis.

14 Q Did you use the retroactive history for any other of
15 the businesses included in this report?

16 A I believe we did.

17 Q You have projections for these sales, don't you?

18 A We have -- yes. In the ArcGIS software, which is
19 very hard to read, there is additional information.

20 Q Sorry. I just don't know what you just said.

21 A Are you familiar with ArcGIS software?

22 Q Did you include ArcGIS software or anything like that
23 in your report?

24 A Yes, we do use ArcGIS software.

25 Q Is that in your report? Is it referred to in your

1 report?

2 A I believe we did. I believe we had mentioned ArcGIS.

3 Q Is that where you made the projections? I will step
4 back a second, and I think I can leave it alone with this.

5 Did Sears, "G-0," generate any revenues that
6 this ArcGIS software would have picked up in table V-3?

7 A I don't know.

8 Q So is it your testimony that the ArcGIS software
9 tells you that there is zero revenue generated in that
10 42,000 square foot Sears space in 2000, 2001?

11 MR. KIM: Objection. Misstates the testimony.

12 MR. MALLONEE: I'm asking if that's his
13 testimony.

14 THE COURT: No --

15 THE WITNESS: I have an idea that there may have
16 been sales revenue there, but there weren't sales revenue
17 great enough for the overage rents to be paid over and
18 above the minimum rent required.

19 BY MR. MALLONEE:

20 Q You know that for every year?

21 A We know that as of December 2000.

22 Q As in December of 2000. They moved in on December 3,
23 2000 -- we are going forward. I'll leave it at that. You
24 didn't attribute any revenues to this 42,000 square foot
25 space, did you?

1 A I believe that is included in the ArcGIS program.

2 Q But it is not included on table V-3?

3 A That's correct.

4 Q Do you know what they actually collected?

5 A I don't know.

6 Q Can you flip to -- we were talking about the Kukui
7 Grove Shopping Center. Can you refer to your other
8 report, page 16.

9 A Yes.

10 Q Do you list on that page, page 16, your opinion of
11 the market value analysis of unimproved fee simple
12 properties, the total retail value prior to discounting,
13 for the properties that you discussed in this report?

14 A You are in the May 2000 report?

15 Q December 2000 report.

16 MR. KIM: For which property?

17 MR. MALLONEE: The non-Kukui Grove one;
18 everything else.

19 MR. KIM: We object to scope. We are not
20 offering the appraisals per se. We were offering it on a
21 narrow issue, Sears. The appraisals we can deal with at
22 another time.

23 THE COURT: That's true. It was restricted to a
24 very tight window.

25 MR. MALLONEE: It goes to materiality. I will

1 go quickly. There is a difference between payments over
2 the lease or whether or not the entire Kukui Grove needed
3 to be liquidated.

4 THE COURT: Let's hear what you have to say.

5 MR. MALLONEE: Okay.

6 BY MR. MALLONEE:

7 Q You list your total retail value prior to discount on
8 this page, correct?

9 A You are on page 16 on the December 2000 report? Is
10 that correct?

11 Q The one for Kukui Commercial Village, Kukui Grove
12 West and the K-Mart properties.

13 THE COURT: What is your question?

14 BY MR. MALLONEE:

15 Q Are you on that page?

16 A I am.

17 Q Have you listed values for these properties, the
18 total retail value of unimproved fee simple properties,
19 prior to discounting, as 24,690,000?

20 A Yes.

21 Q Have you listed the total retail value of TMK-330612
22 and the 16 leased fee properties as 20,660,000?

23 A Yes.

24 Q Have you listed the value for the Kukui Grove
25 Shopping Center as 13 million?

1 A Not on this page.

2 Q I'm sorry. I jumped back to your previous report.

3 A Yes.

4 Q And then you discounted these properties, didn't you,
5 because of the liquidation value that was being attributed
6 to Grove Farm, correct?

7 A It is true for two line items there. It is not true
8 for your third line item.

9 MR. KIM: Your Honor, I think we are still
10 outside of scope. I haven't seen this tied up yet.

11 MR. MALLONEE: It will be. Give me a second.
12 This was discounted.

13 BY MR. MALLONEE:

14 Q Is that your rough opinion?

15 A You are wrong. You labeled that discounted. That's
16 before the discount. 24,690,000 then gets discounted by a
17 factor.

18 Q I was trying to point out it does get discounted
19 later on. But my question is --

20 A But you are aggregating it in the undiscounted
21 condition, and then I don't know what you are going to do
22 with the new total of eggs and oranges.

23 Q That's an approximate total. 68 million is an
24 approximate total?

25 A What have you just written? I can't read it.

1 Q I had to write, "Not discounted" at the top. My
2 point is, if you are going to discount those two by 50
3 percent for liquidation of value -- my question is, if you
4 don't know the value of the Sears lease, how can you
5 provide discounted values if you don't know that Grove
6 Farm actually needs to sell them at a discount?

7 A We haven't said that I don't know the value of the
8 Sears lease. The ArcGIS program gave us a result,
9 including Sears.

10 Q We have talked about the Sears lease. I want to say
11 that's your non-discounted total opinion, correct,
12 ballpark? If you add back in the termites, it is
13 37 million -- I mean, 73 million?

14 A As is made perfectly clear on page 16 of
15 Exhibit 2204, it is the second page. 16 related only to
16 Commercial Village. The 24,690,000 is later discounted by
17 50 percent. The TMK-33612 and 16 leased-fee properties,
18 before discounting have a \$20,660,000 value, and they are
19 discounted at 85 percent to 17,560,000. The shopping
20 center, \$13 million value, does not become further
21 discounted. That's why I say you have got apples, eggs,
22 oranges, turkeys, cats, whatever.

23 THE COURT: Do you have any further questions?

24 MR. MALLONEE: No further questions.

25 THE COURT: Anything further?

1 MR. KIM: Nothing further.

2 THE COURT: Thank you. Thank you, Mr. Hastings.

3 THE WITNESS: Thank you, sir.

4 THE COURT: Your next witness.

5 MR. KIM: At this time the defense calls Mary
6 O'Connor, who is out of the room right now.

7 (The witness was duly sworn.)

8 THE WITNESS: Mary A. O'Connor. O'C-O-N-N-O-R.

9 DIRECT EXAMINATION

10 BY MR. KIM:

11 Q Good afternoon, Ms. O'Connor.

12 A Hello.

13 Q Ms. O'Connor, what do you do for a living?

14 A I am an appraiser qualified to value businesses.

15 Q And is appraising a business different than
16 appraising real property?

17 A In some ways it is the same and in some ways it is
18 different.

19 Q Is it considered a separate discipline within your
20 general field?

21 A Yes, it is.

22 Q In that field do you have any certifications?

23 A Yes, I do. I am a senior member of the American
24 Society of Appraisers.

25 Q How long have you been engaged in business

1 evaluation?

2 A Sometimes longer than I care to admit. Let's say
3 over 25 years.

4 Q And as part of providing opinions regarding business
5 valuations, do you also provide fairness opinions in the
6 context of corporate transactions?

7 A Yes, I have done that.

8 Q How extensive is your experience in that regard?

9 A I would consider it extensive; during many different
10 decades and different economic conditions.

11 Q Can you explain at a fairly high level of generality
12 the ways in which you can value -- put a dollar value on
13 100 percent of stock of a corporation?

14 A Yes. Appraisal theory in capitalism always endeavors
15 to apply three approaches to value. Generally the most
16 reliable, because it is so based on the specific situation
17 of the company, is what's known as the income approach.
18 Then there is an attempt to use a market approach where
19 comparable transactions are analyzed in relation to the
20 subject company. We know the price that a comparable
21 company was traded at, therefore, we can draw some
22 conclusions as to where we think the subject company would
23 trade.

24 And, finally, there is what is known as the
25 asset approach. It used to be known as a cost approach,

1 but it is where the value of the enterprise is really the
2 sum of its assets or the fair market value of its assets.

3 Q And with respect to Grove Farm Company, which
4 approach did you ultimately use?

5 A I began with a look at an income approach, and since
6 we are valuing shares of the corporation, we are looking
7 for how much cash flow did this particular corporate
8 entity throw off to its shareholders.

9 On that analysis, typically that cash flow is a
10 positive number for several years prior to a transaction.
11 Based on my analysis, it was a negative cash flow.
12 Sometimes many millions; sometimes a few hundred thousand,
13 but never positive.

14 Q Let me stop you there. If the cash flow is not
15 positive, is it possible to do an income analysis of a
16 corporation?

17 A No. You can regard it something as a decision tree.
18 If you cannot reach a positive number employing an income
19 approach -- and remember, and I think it is worthwhile to
20 go back to the definition of fair market value. It is a
21 willing seller and a willing buyer with a reasonable grasp
22 of the facts of the situation. It is my job to fully
23 analyze the seller and to model who the potential buyer
24 would be of the corporation.

25 The potential buyer in this case would be really

1 under an orderly liquidation premise. Grove Farm at the
2 time of this valuation, given its negative cash flow, as
3 an entity, didn't have enough value to economically hold
4 the assets that it did.

5 Therefore, a prudent buyer and seller situation
6 would be one where I want to get cash for those assets, so
7 how would I go about doing that? I could either sell
8 shares, but probably I would go into some sort of
9 liquidation analysis and ultimately draw cash that could
10 be distributed to the shareholders that they could go
11 employ in a much more economic fashion.

12 Q Let me ask you briefly then about the comparable
13 transactions approach. Were you able to use that approach
14 with respect to Grove Farm?

15 A No, I did not. I did not find transactions that were
16 specific enough to the specific situation of Grove Farm.
17 I would have to make too many assumptions in my belief to
18 make a good comparison, a valid comparison.

19 Q Turning to the asset approach or liquidation
20 approach, does your use of that approach necessarily mean
21 that Grove Farm is insolvent or bankrupt?

22 A No. It just means that the value of the cash flow,
23 into the foreseeable future, does not warrant retention of
24 the assets under its current ownership.

25 Q Okay. And now I just want to focus on the asset or

1 orderly liquidation scenario. Under that scenario, would
2 it be appropriate to simply add the retail value of all
3 the individual assets owned by the corporation?

4 A No, it would not, because, again, we're going back to
5 the decision tree. Our corporation doesn't warrant
6 retention of the assets. Therefore, assuming that
7 management would then turn to liquidate in a reasonably
8 finite period of time, you know, turn all of those assets
9 into cash, pay off their taxes, pay off their liabilities,
10 have some cash left to distribute to shareholders over a
11 reasonable period of time, that is inherently the
12 definition of a orderly liquidation, not a fire sale, just
13 an orderly liquidation.

14 Q Because of that, you look at factors other than the
15 retail value of the retail assets?

16 A Absolutely. "Retail," by definition, particularly
17 for real estate, are for assets that have been fully
18 developed, full infrastructure, Grove Farm, operating as a
19 truly functional real estate development company. You
20 would look at that value; as to how many years would it
21 take to get to that kind of a retail value. What kind of
22 investment would you have to make? How many years would
23 it take to get there and reduce it back to present value?

24 That wasn't the situation that Grove Farm was
25 in. They were limping along, at best, kind of slowly

1 cutting off pieces of themselves. So an orderly
2 liquidation scenario, again, because an income approach is
3 impossible to apply, to me, is the appropriate way to
4 evaluate the asset.

5 Q Okay. I want to turn your attention to schedule 3 of
6 your report, which is Exhibit 2306 in front of you.

7 A Which schedule would you like me to look at?

8 Q Schedule 3.

9 A Yes.

10 Q And, Ms. O'Connor, I don't want to focus on the
11 numbers for now. I want to focus on the theory behind
12 what you are doing. So in the assets column, can you
13 describe generally what you are putting in the assets
14 column.

15 A First of all, I'm using financial information, the
16 same financial information that the willing buyer would be
17 looking at; namely, September 30th, 2000. We know on that
18 date cash and other assets -- I'm sorry -- we are not
19 going into numbers. We know that there was cash. We know
20 that the corporation had machinery and equipment.

21 We estimated what a cash value would be for that
22 equipment. I relied on the appraisals produced by the
23 Hastings & Medusky firm. That was subtotaled. This is
24 the estimated proceeds from the bulk sale of the real
25 estate over a period of time, 12 months to 18 months,

1 again, per the estimate of the real estate appraisers.

2 There are costs of sales, broker fees, lawyer
3 fees, finder's fees. So there would be some net proceeds
4 before capital gains tax. You have to pay your taxes. So
5 we take the capital gains tax out.

6 We then derive net proceeds from the bulk sale
7 of the real estate, which we believe would be 12 months to
8 18 months out. So we brought that back to present value,
9 and I also added in the substantial tax loss carry forward
10 as a dollar-for-dollar asset and arrived at a total asset
11 value under this scenario, subtracted its liabilities.

12 Over that 18 months the company would have to
13 continue to function to make this sale happen. So the
14 wind-down costs would also come out of cash proceeds. We
15 arrive at a net asset value, which would then be assumed
16 to be distributed to the shareholders.

17 Q Turning to the inputs, into that, specifically with
18 respect to the Jan Medusky and Bob Hastings' appraisals,
19 do you recall that those appraisals included a bulk
20 discount?

21 A Some of them did.

22 Q Is it your judgment that the use of a bulk discount
23 in this scenario is appropriate?

24 A It is the only way you could sell this much property
25 in this time frame.

1 MR. KIM: Thank you very much, Ms. O'Connor.

2 That's all the questions I have.

3 CROSS-EXAMINATION

4 BY MR. MALLONEE:

5 Q Good afternoon, Ms. O'Connor.

6 A Hello.

7 Q Did you use your business expertise to determine that
8 a bulk discount should be used or is that part of their
9 assignment?

10 A I would say I used my business expertise.

11 Q So was -- in your opinion -- was it your choice to
12 use the liquidation value?

13 A That is just simply the application of business
14 valuation theory, and I could repeat that part about, if
15 you can't get a positive income approach, and it appears
16 economically that the assets should be liquidated, I
17 suppose -- we could have gone to a fire sale approach, but
18 that's not appropriate. That's not a prudent way to
19 handle it. An appraisal theory really directs you to some
20 notion of orderly liquidation.

21 Q Are you aware that the land of Grove Farm was
22 recorded on the books at book value?

23 A Yes.

24 Q And market value was much, much higher than the book
25 value?

1 A Yes.

2 Q And you testified in your deposition that Grove Farm
3 was not insolvent in the sense that its assets continued
4 to exceed its liabilities at December 1, 2000?

5 A Insolvency usually has two tests. As we say in the
6 Midwest, some entities are dirt poor. They work. They
7 had declining cash, but they had a lot of -- they did have
8 assets.

9 Q You said there were two tests: One is assets
10 exceeding liabilities. So for insolvency, Grove Farm was
11 not insolvent, in your opinion, based on that one test?

12 A But the other test; namely, cash to cover your
13 current obligation, they were failing.

14 Q Your opinion that we are all in agreement, they
15 weren't on the first test, the assets greater than
16 liabilities test and so on, correct?

17 A I would agree.

18 Q The other test is whether or not the company can meet
19 its current obligations, correct?

20 A That's correct.

21 Q And there would be no reason to liquidate if
22 Grove Farm were not insolvent by that test, correct?

23 A Oh, that is not true. Again, for the prior four
24 years to this particular sale, wealth was being depleted,
25 not increased. That's why in a capitalist society we

1 function the way we do under the principles that we
2 function.

3 It makes -- it would have made more sense to,
4 given the negative cash flow situation of the company, to
5 do an orderly liquidation rather than just sit and
6 continue to bleed.

7 Q Does an orderly liquidation necessitate discounts of
8 approximately 40 to 50 percent of the value of the asset
9 you are liquidating?

10 A Again, it is not my opinion. It is the real estate
11 appraisers who I have confidence in.

12 Q I probably shouldn't write on the board again, but
13 the real estate appraisers, you are aware that -- I guess.
14 Turn to your schedule III, please.

15 The 73 million number that you have on your
16 schedule III is from Jan Medusky, correct?

17 A Yes.

18 Q You're aware that his opinion as to the aggregate
19 market value as to that portion of the land is
20 121,675,000, correct?

21 A I don't remember the exact number, but that would be,
22 we call the retail value.

23 Q Mr. Medusky referred to it specifically as the
24 aggregate market value?

25 A Prior to a discount for liquidation.

1 Q Prior to his bulk discount, I believe. He used the
2 term "bulk." You have used the term "liquidation."

3 We just heard Mr. Hastings testify to the two
4 previous values on here.

5 THE COURT: That's what she said, and she relied
6 on those figures.

7 MR. MALLONEE: But to put in perspective what
8 she is recommending should be done in a case where a
9 company may or may not be cash shy is liquidating its real
10 estate holdings, where it may or may not meet its current
11 obligations, and I believe Ms. O'Connor will testify --

12 THE COURT: My question is: You referred to the
13 two figures, which she adopted for her report. If those
14 figures are erroneous, then her conclusions will be
15 erroneous obviously. But what is your next question?

16 BY MR. MALLONEE:

17 Q You wouldn't recommend liquidating a company which
18 had a value of \$170 million for failure to meet a payment
19 or proposed -- or expected failure to meet a payment that
20 it could actually make, would you?

21 MR. KIM: Objection. She is not recommending
22 anything. She was testifying about theory.

23 THE COURT: She hasn't testified to anything
24 like that.

25 BY MR. MALLONEE:

1 Q Okay. We are close to the second theory of
2 insolvency. The second theory of insolvency is that a
3 company could not meet its current obligations, and that's
4 when the liquidation method should be used, correct?

5 A No.

6 Q If a company could continue to meet its current
7 obligations, there would be no need to liquidate its
8 assets, correct?

9 A No.

10 Q So it is not your testimony that -- well, having seen
11 Grove Farm's financials, is it your testimony that
12 Grove Farm should have engaged in a liquidation of its
13 assets?

14 A No.

15 MR. KIM: Objection; relevance.

16 THE COURT: She didn't make a statement -- she
17 does in her report, so I can understand what you are
18 concerned with. But she didn't testify to this piecemeal
19 approach that was taken. I have read her report. And she
20 does; she gave you the full Monty.

21 BY MR. MALLONEE:

22 Q In deposition, you testified that Grove Farm could
23 have kept on limping along. Is that correct?

24 A Yeah. That doesn't mean that's the economic thing to
25 do, and that's what I model.

1 Q Okay. So your testimony is that Grove -- okay. The
2 liquidation value here, you said that Grove Farm -- your
3 economic model is a liquidation model, but you have no
4 opinion whether Grove Farm should be liquidating
5 December 1, 2000, correct?

6 A I think that's a fair characterization.

7 Q Would it matter if the stockholders were irrationally
8 attached to it?

9 A We assume in a capitalist economy that investors act
10 rationally.

11 Q So your assumptions wouldn't work for a family that
12 wouldn't behave that way?

13 A We are talking about a theoretical economic
14 situation. If I cannot value a company by its cash flow,
15 I have to value it using some other model; in this
16 particular case, in order to do a liquidation model that
17 gets to what I believe is the market value of the shares.

18 Q We already touched the real estate appraisers, so I
19 will go to the rest of your assumptions in the report. If
20 the real estate appraisals are incorrect, those numbers on
21 your report are incorrect?

22 A That would be true.

23 Q Just several other assumptions in the report. For
24 cost of sale, you determined that number based upon
25 numbers used in the sale, correct?

1 A I based that on an estimate, which is usually
2 expressed, particularly for real estate, as a percentage
3 of proceeds what I believe it would cost to liquidate a
4 property of this magnitude. It would be a very expensive
5 proposition.

6 Q Then I want to jump to the top. You have a figure of
7 775,000 for the estimated fair market value of the
8 machinery, equipment, autos, trucks and office furniture.
9 Is that correct?

10 A Yes.

11 Q You got that figure by multiplying the actual figure
12 on Grove Farm's books by 10 percent, correct?

13 A Yes.

14 Q And the reason that you chose 10 percent -- have you
15 used 40 percent for that category in "other work" of
16 theirs?

17 A Well, you always pick a percentage based upon the
18 particular market for particular types of equipment. In
19 my opinion, 10 percent is appropriate.

20 Q Did you choose that 10 percent number because you
21 were told by management at Grove Farm that a large portion
22 of this category were cars and office furniture?

23 A No.

24 Q Did you testify to that in your deposition?

25 A I'm not sure. My understanding is that many of the

1 assets -- this is after the rock-crushing equipment had
2 been sold. We had a lot of trucks and a lot of furniture.

3 Q Above the highlighted portion, can you read. I'll
4 read my question. You read your answer.

5 I say, "Okay. But I mean -- I am just trying to
6 find out where it came from, if it is from a book" --
7 maybe go to the one above that.

8 THE COURT: We are really not getting very far
9 comparing percentages of stainless steel equipment that
10 might be substantial value versus Lord knows how much
11 sugar plantation residue is kicking around with no market
12 value, after you get all of our plantations going down.

13 MR. MALLONEE: I thought we would go through it
14 quickly.

15 THE COURT: You got another 45 minutes, if you
16 need it. I don't want to you use it.

17 MR. MALLONEE: I thought we would wrap that one
18 up quickly.

19 BY MR. MALLONEE:

20 Q You used 10 percent and you have used 40 percent
21 before, correct?

22 A I believe 10 percent is applicable to what I believe
23 is included in this lot of equipment. We are also in a
24 remote location.

25 THE COURT: I am glad your name isn't Sandra Day

1 O'Connor. If you would put that back up, in fairness.
2 You went fairly fast for me. I thought the 40 percent
3 assumption -- "Where I used 40 percent, it was a great
4 deal of equipment that was made of stainless steel and
5 those -- and the resale value there is -- is top dollar."
6 That's the point I was making.

7 MR. MALLONEE: Right. But she goes on to say in
8 her deposition that the management at Grove Farm told her
9 these were mostly cars, and the balance sheet shows they
10 are not. I can let that point go. You are right; it is
11 only \$6 million.

12 MR. SIMMONS: I care. That's a lot of money.

13 MR. MALLONEE: It is \$6 million.

14 THE COURT: Do you have another question for the
15 witness?

16 BY MR. MALLONEE:

17 Q You used 10 percent for liquidation for equipment.
18 What would you use for a fire sale?

19 A You would pay someone to take it away.

20 MR. MALLONEE: For materiality for this witness,
21 we have no other questions, Your Honor.

22 THE COURT: Thank you.

23 MR. KIM: Your Honor, very brief redirect.
24
25

REDIRECT EXAMINATION

BY MR. KIM:

Q Ms. O'Connor, by using the liquidation scenario for your valuation of the company, are you making any sort of judgment about what the company should or should not have done?

A No.

Q And the reason you are using that scenario is because you cannot use the income approach, correct?

A That is correct.

Q It is possible to use the liquidation scenario, even if the company could survive for years and years, if there is no positive cash flow generated?

A Yes.

MR. KIM: That's all the questions I had. Thank you.

THE COURT: Thank you ma'am.

Anything further for the defense?

MR. NAKASHIMA: We are still waiting for plaintiffs to rest.

MR. SIMMONS: It is not going to happen. Those words can't come out of my mouth.

MR. NAKASHIMA: Rest on this phase?

MR. SIMMONS: I'm definitely not going to do that until I get some motions on my exhibits and some

1 things we have got to put in tomorrow. I will make a
2 qualified rest tomorrow. How is that?

3 THE COURT: The issue, I can address sua sponte
4 any time, under Rule 52. The bench trial has a special
5 segment.

6 MR. ALSTON: I think 52(c), Your Honor.

7 THE COURT: I thought we had an agreement that
8 we were going to close off the testimony and argue the
9 merits before we did anything further on motions. Have
10 you closed off your evidence on merits?

11 MR. SIMMONS: No, I have not. I have closed
12 witnesses. I need to move in some exhibits that they
13 wouldn't stipulate to. To the extent there was an
14 agreement, I thought the agreement was I could basically
15 make a qualified rest; say, I am going to rest and argue
16 the merits based on the assumption that my experts are
17 credible and so forth on the damages side, and we have the
18 reports, and the Court can make a determination later. I
19 am fine doing it that way, and I thought that's what
20 everybody wanted. I wasn't trying to hold the merits
21 open, but I needed to deal with housekeeping stuff.

22 THE COURT: What do you need to deal with on
23 reports? What do you have in your hand?

24 MR. SIMMONS: This is just exhibits. I was
25 going to make a motion on some of the exhibits that they

1 weren't going to stipulate to.

2 THE COURT: Okay. Go ahead.

3 MR. SIMMONS: Exhibit 1020 is a set of documents
4 pertaining to -- well, it is her document. It cites 60
5 pages. It is the production and all her efforts and the
6 correspondence pertaining to her efforts to buy her
7 property at the Kukui Grove Commercial Village West area,
8 and the Court heard today that Danton Wong's outfit had
9 been told there were no offers to purchase any of the
10 leased-fee interests. That's a reference to what
11 Ms. Daniel was trying to buy for almost ten years.

12 Guido Giacometti testified that he was ordered
13 not to sell her that. I would move on Exhibit 1020 and
14 1034, which is the letter returning Dixie Daniel's check
15 and the \$1.56 million contract as relevant, particularly
16 as to the issue whether the company needed to be
17 liquidated. I refrained from calling her. I was going to
18 do an offer of proof, but I think the documents and
19 Guido's testimony are sufficient.

20 THE COURT: All right.

21 MR. SIMMONS: They have "objection" written
22 down.

23 MR. ALSTON: Your Honor, this is a package of
24 material that involves a woman who was trying to buy a
25 particular parcel of property, but it has nothing to do

1 with insider trading. The fact there was correspondence
2 in '98 and the fact that there may have been a check
3 returned in April of 1998 has nothing to do with insider
4 trading. That's why we objected.

5 MR. SIMMONS: They knew -- we went through the
6 notes. They were being told what offers were out there
7 for other land, according to the notes we went through
8 from that time period. First of all, it absolutely does
9 have to do with insider trading. Second of all, it has to
10 do with whether or not the company had to be liquidated or
11 not.

12 THE COURT: I will accept those as your offers
13 of proof. I will take under advisement the admissibility.
14 But what I want, so we will all be understanding -- is
15 that all you got now?

16 MR. SIMMONS: No. They basically picked all the
17 things they don't like and said "objection."

18 THE COURT: Well, that's fine. Go ahead and
19 make your offers.

20 MR. SIMMONS: I have made very few objections to
21 their evidence.

22 I have got 1037 and 1038, which are documents
23 pertaining to the various corporate entities involved,
24 their operating agreements and other documents, many of
25 which are signed by Stephen Case, showing the

1 interrelation between his companies. That's 1037, 1038,
2 1084, 1093, 1235, 1236, 1376 and 1378.

3 That batch deals with the existence,
4 interrelationships and Steve Case's relationship to
5 various entities, including ALPS, that we talked about
6 during this case. They are things like ratifications,
7 signed consents of a single member of an LLC, all the
8 organic documents that I intended to argue -- among other
9 things, alter-ego issues -- off of, if I need to. If
10 nothing else, they show that the company existed; that
11 Steve Case ratified what happened, things like that.

12 THE COURT: No one has contested that whatever
13 ALPS did was attributable to Stephen Case. In fact, the
14 opposite has been asserted, that the ALPS signature was
15 sufficient, because it represented Stephen Case's assets.

16 MR. SIMMONS: So if there is no dispute that
17 Stephen Case is chargeable with whatever ALPS did, then I
18 don't need those documents.

19 THE COURT: Just a minute. There is no dispute
20 on that, is there?

21 MR. ALSTON: There is no dispute that ALPS was
22 acting for and on behalf of Stephen Case.

23 THE COURT: So you just saved yourself a lot of
24 work.

25 MR. SIMMONS: No problem. I can get through

1 this a lot quicker with that.

2 THE COURT: Then smile. (Laughter)

3 MR. SIMMONS: I have been having to fight for
4 that for three years. Ten minutes from being done, they
5 decide to give in and throw in the towel.

6 THE COURT: All right.

7 MR. SIMMONS: I am not proud. I will take it
8 any way I can get it. That cuts out a lot of these,
9 Your Honor.

10 1495 -- I have a few more, Your Honor.

11 THE COURT: Why don't you take a look at all
12 that and see what they object to. And before we -- you
13 have got another half hour to talk. Then I'll accept as
14 an offer of proof anything that you have got there that
15 they object to so it is on the record. Then they will
16 have an objection on relevancy, saying these documents
17 don't have anything to do with insider trading, which is
18 their basic objections.

19 And then I want to hear your argument tomorrow
20 as to what you think is the insider trading evidence. And
21 if you think you have got a hook with some of these
22 documents, you can say: We made an offer of proof that
23 these are relevant to insider trading because of ta-da,
24 ta-da, ta-da. You don't have to argue it twice. You
25 argue it once.

1 MR. SIMMONS: Fair enough. Thank you.

2 THE COURT: And they don't have to stand up and
3 object to each and every one of them.

4 MR. SIMMONS: Which I think we tried to avoid
5 throughout. With that suggestion, I think we can work out
6 what we need to work out. If not, I'll make my offer of
7 proof. The one issue we just got rid of was the most of
8 what I was worried about.

9 Is there any objection to the Miles and Wattson
10 documents? I think we both had put in binders of
11 Tony Wattson documents.

12 MR. ALSTON: We agreed to put in depositions. I
13 assumed that carried with it exhibits.

14 MR. SIMMONS: I did, too. I just didn't want to
15 leave off without saying that. So those are in evidence,
16 because we have been referring back and forth to them.

17 Other than that, I will wrap up the last couple
18 of things I have to do tomorrow in terms of exhibits and
19 make argument.

20 THE COURT: Now, as far as the defense is
21 concerned --

22 MR. ALSTON: Yes, Your Honor.

23 THE COURT: You have the right under the Federal
24 Rules of Civil Procedure for bench trials to make a motion
25 for judgment as a matter of law at any juncture at the

1 completion of the issues. I assume, since you have made
2 such a motion on statute of limitations, I assume that you
3 would make the same motion on merits?

4 MR. ALSTON: We do, Your Honor.

5 THE COURT: And on that, I will hold in abeyance
6 anything further to see whether there is anything further
7 to rule upon. But I can't rule upon the motion. I'll
8 assume, for the record, it has been made, but I want to
9 hear the arguments so I can make an intelligent decision.

10 MR. ALSTON: That's what we assumed you would
11 do, Your Honor. We wanted to make it for the record. We
12 want to address, and we will do this tomorrow, the issue
13 of whether this is an omission case or a misrepresentation
14 case. But, yes, thank you, Your Honor, for accepting that
15 oral motion.

16 THE COURT: Okay. That's fine.

17 For the arguments, tomorrow, are you going to
18 have additional PowerPoint-type materials for the Court?

19 MR. ALSTON: Yes, Your Honor, I will.

20 THE COURT: That's not your style.

21 MR. SIMMONS: No. I like slick timelines. But
22 at the rate I'm going, it is going to be in Crayon. I am
23 sort of half kidding. I may have to end up doing them by
24 hand.

25 THE COURT: I had many lawyers say, "Judge,

1 can't I just use butcher paper?" I don't care how you do
2 your argument.

3 MR. SIMMONS: I don't expect doing a PowerPoint.

4 THE COURT: I have seen multi-million dollar
5 cases argued with no visuals. So it is all up to you as
6 advocates.

7 So we are clear, you have got an hour and a
8 half. We have to start at 1:15. But please be ready at
9 1:15. Have all your stuff laid out so if you start to
10 meet with Leslie, she will be here before that. She likes
11 to work through her lunch hour. Seriously --

12 THE CLERK: The courtroom will be open very
13 early.

14 THE COURT: And then as far as your time is
15 concerned, you can split it any way you want and divide it
16 any way you want. Same thing for rebuttal. I usually
17 grant -- 1:15 -- and then we have an afternoon break and
18 then we go. We will plan on -- usually the defense
19 argument is briefer than the plaintiffs. But if it is --
20 whether it is or is not, I'll allot you 20 minutes for any
21 rebuttal. You told me you wanted to make a fairly short
22 opening argument and more rebuttal.

23 MR. SIMMONS: You are saying I get an hour and a
24 half and then 20 minutes on rebuttal?

25 THE COURT: Yeah.

1 MR. SIMMONS: That's sufficient. I can do that.

2 THE COURT: Or you can take 20 minutes for your
3 opening and use the rest for your rebuttal. I don't care.
4 That's how much you got.

5 MR. ALSTON: It is an hour and a half in the
6 aggregate, Your Honor?

7 THE COURT: No. Because he has got the burden
8 of proof, it is traditional to give additional time to the
9 plaintiff.

10 MR. ALSTON: That's fine, Your Honor.

11 THE COURT: Plus my experience is that the
12 defense is usually briefer than the party with the burden
13 of proof.

14 MR. ALSTON: I will be.

15 THE COURT: As far as the merits are concerned,
16 I think it is all plaintiffs' burden of proof, unlike the
17 statute of limitations.

18 Okay. Do you have any further questions for me
19 from the plaintiff?

20 MR. SIMMONS: No, Your Honor.

21 THE COURT: From the defense?

22 MR. ALSTON: No, Your Honor. But I would like
23 to clarify one thing. That is, I was earlier
24 acknowledging that Steve Case was at the top of a very
25 short chain of agents. I was not saying that Mr. Case was

1 the alter-ego of anybody or anything. I wouldn't want to
2 be quoted for that -- have my remarks quoted back in the
3 future for that purpose.

4 THE COURT: We are only talking about ALPS and
5 this transaction.

6 MR. ALSTON: I understand. Thank you.

7 THE COURT: That's all that is relevant here.

8 Okay. Thank you.

9 Thank you for your cooperation throughout the
10 trial. I am glad we got it done in a timely fashion.

11 (Recess.)
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--oOo--

I certify, by signing below, that the foregoing
is a correct transcript of the record of proceedings in

/s/ Dennis W. Apodaca

November 24, 2008

Dennis W. Apodaca, RMR
Official Court Reporter
1000 SW Third Avenue, Room 301
Portland, Oregon 97204
(503) 326-8182